

THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

Kelvin & Katina Coleman

Plaintiffs

v.

No. 3:13-cv-1120 / Jury

Haynes/Griffin

Electrolux Home Products, Inc.

Defendant

PROTECTIVE ORDER

“Documents that affect the disposition of federal litigation are presumptively open to public view.” *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). There are many reasons for this, including allowing interested members of the public to know who’s using the courts, to understand judicial decisions, and to monitor the judiciary’s performance of its duties, *see id.* at 597–98, as well as avoiding the unnecessary duplication of discovery in similar cases so as to secure the “just, speedy, and inexpensive determination of every action.” *Fed. R. Civ. P. 1*; *see also Garcia v. Peebles*, 734 S.W.2d 343 (Tex. 1987) (recognizing that shared discovery keeps parties honest and makes litigation more cost effective and less time consuming). On the other hand, discovery and the trial of this lawsuit may involve the disclosure of confidential, proprietary, or sensitive information that if released to the public could irreparably injure a party.

After weighing these competing interests, the Court hereby orders that the following govern the disclosure of the information, documents, photographs, communications, electronic data, and other materials produced in discovery in this lawsuit (hereinafter “discovery”). The parties governed by this Order shall include not only to the named parties, but also State Farm Fire and Casualty Company, Plaintiffs’ subrogating carrier:

1. **Confidential Designation:** A entity may apply the designation “confidential” to discovery if it reasonably and in good faith determines that such discovery constitutes sensitive, nonpublic material, which if disclosed would cause clearly defined, irreparable harm to the producing party. “Harm” here means (i) the loss or

meaningful impairment of a competitive advantage within the market for a good or service, or (ii) the imposition of such a loss or meaningful impairment. Examples would include: sensitive trade secrets, technical practices, and methods or know-how of a compelling nature; present or future marketing plans; profit and loss data or projections; shareholder information; business strategy; financial data and projections; confidential agreements or relationships with third parties; and other materials or information that a producing party is under a pre-existing legal obligation to a third party to treat as confidential.

2. Notwithstanding the designation of discovery as confidential, it will not be deemed as such if the content or substance thereof:
 - a. is, when disclosed, in the public domain and is not otherwise protected from disclosure as a result;
 - b. becomes at any time, through no act or failure to act on the part of the receiving party, part of the public domain;
 - c. loses, through no act or failure to act on the part of the receiving party, that which would make its disclosure harmful to the producing party;
 - d. is already in the possession of the receiving party when disclosed and was acquired other than from the producing party under conditions requiring the confidential treatment of the discovery; or
 - e. is made available to a party by a third party who obtained the same by legal means and without any obligation of confidence to the party claiming its confidential nature.
3. **Exercise of Restraint and Care in Designating Discovery for Protection:** Each entity that designates discovery for protection under this Order must take care to limit any such designation to specific material that qualifies for protection. To the extent it is practical to do so, the producing party must designate for protection only those parts of discovery that qualify—so that other portions of the discovery for which protection is not warranted are not swept unjustifiably within the ambit of this Order. Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be unjustified or that have been made for an

improper purpose (e.g., to unnecessarily encumber or retard the case development process or to impose unnecessary expenses and burdens on other parties) expose the producing party to sanctions. If it comes to a producing party's attention that information or items that it designated for protection do not qualify for protection (or do not qualify for the level of protection initially asserted), that producing party must promptly notify all other parties that it is withdrawing the designation.

4. **Designating Protected Discovery:** To designate and categorize discovery as “confidential” and subject to the protections of this Order, the producing party shall stamp “CONFIDENTIAL” on each page of such discovery. If only a portion or portions of the material on a page qualifies for protection, the producing party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins). This labeling shall bring that discovery under the protections of this Order.
5. Data produced that has not been reduced to paper form may be designated confidential by labeling the media containing such information with the appropriate designations. If possible (as dictated by the media), any such designation may also be included in the metadata for each electronic document or another discrete piece of electronic information. To the extent that the media is so labeled, the information contained in/on that media shall be considered to bear that designation.
6. An entity that makes original discovery available for inspection need not designate it for protection until after the inspecting party has indicated which material it would like copied and produced. During the inspection and before the designation, all of the discovery made available for inspection shall be deemed confidential. After the inspecting party has identified the discovery it wants copied and produced, the producing party must determine which discovery, or portions thereof, qualify for protection under this Order. Then, before producing the specified discovery, the producing party shall affix the appropriate stamp to each page that contains confidential information. If only a portion or portions of the material on a page qualifies for protection, the producing party also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the margins).

7. Testimony or other material disclosed or to be disclosed at any deposition in this lawsuit may be designated and categorized as confidential under this Order by notifying all parties or their counsel in writing of such designation prior to the deposition or by making such a designation, in writing to all parties or their counsel, within 21 days after the last day of the deposition. Any such designation must comply with this Order.
8. Transcripts containing confidential discovery shall have a clear legend on the title page that the transcript contains confidential discovery, and the title page shall be followed by a list of all pages (including line numbers as appropriate) that have been designated confidential. The designating party shall inform the court reporter of these requirements. Any transcript that is prepared before the expiration of a 21-day period for designation shall be treated during that period as if it had been designated confidential in its entirety unless otherwise agreed. After the expiration of that period, the transcript shall be treated only as actually designated.
9. Should a question asked at a deposition be reasonably calculated to reveal confidential information, the witness shall nevertheless answer the questions fully. But prior to answering, all present shall be advised of and shall agree to the terms and conditions of this Order and, at the request of the producing party, all persons, other than the witness and the witness' counsel, who are not allowed to obtain such information pursuant to this Order shall leave the room while the confidential information is disclosed.
10. **Production by Non-Parties:** Should a party be obligated to produce a nonparty's confidential discovery in its possession, and the party is subject to an agreement with the nonparty not to produce the nonparty's confidential discovery, then the party shall:
 - a. promptly notify in writing the requesting party and the nonparty that some or all of the discovery requested is subject to a confidentiality agreement with a nonparty;

- b. promptly provide the nonparty with a copy of this Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the discovery requested; and,
- c. make the discovery requested available for inspection by the nonparty.
- d. If the nonparty fails to object within 14 days of receiving the notice and accompanying discovery, the receiving party may produce the nonparty's confidential discovery responsive to the discovery request. If the nonparty objects, the receiving party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the nonparty before a determination by the Court. Absent a court order to the contrary, the nonparty shall bear the burden and expense of seeking protection in this court of its protected material.

11. Access to Confidential Discovery: Designated confidential discovery under this Order may be disclosed only to the following persons, and shall not be distributed or otherwise disseminated:

- a. attorneys from any law firm for any named party to this lawsuit, in-house counsel for any named party to this lawsuit, and attorneys for Plaintiffs' subrogated carrier, State Farm Fire and Casualty Company;
- b. the parties themselves and Plaintiffs' subrogated carrier, State Farm Fire and Casualty Company;
- c. secretarial, clerical, and legal assistants working under the supervision of the aforementioned attorneys;
- d. outside contractors hired by any of persons designated above to copy, index, sort, or otherwise manage the storage and retrieval of discovery, provided that such outside contractors have agreed to keep any documents or other information they have access to confidential;
- e. independent consultants and experts, to the extent disclosure is in good faith necessary and provided that such consultants and experts have signed the form attached hereto as Exhibit A;

- f. any other person during the course of depositions in this lawsuit or oral or written examinations, provided that any such person was, at the time the document was prepared, a director, officer, or employee of the producing party, except that any such document or information shall not be left in the possession of the deponent;
- g. court reporters and videographers who record and/or transcribe deposition or other testimony in this lawsuit;
- h. third-party mediators selected by the parties provided that such mediators have agreed to keep any documents or other information they have access to confidential; and,
- i. the Court and its staff.

12. Restrictions on Use: A receiving party may use confidential discovery that is disclosed or produced by another entity in connection with this case only for prosecuting, evaluating, defending, or attempting to settle this litigation or other substantially similar claims or litigation. Notwithstanding this limitation, nothing herein shall prohibit:

- a. an entity from disclosing confidential discovery to any person that the discovery directly or indirectly identifies as an author, addressee, or carbon copy recipient of such discovery;
- b. counsel from disclosing discovery produced by a party to current employees and officers of the producing party;
- c. the identification of the confidential discovery and its general subject matter (without revealing its confidential contents) to establish the existence of such discovery; or,
- d. a party from using its own confidential discovery in any manner it sees fit, or from revealing such confidential discovery to whomever it chooses.

Furthermore, regardless of designation, if a document or testimony makes reference to the actual or alleged conduct or statements of a person who is a potential witness, counsel may discuss such conduct or statements with such witness without revealing any portion of the document or testimony other than that which

specifically refers to such conduct or statement, and such discussion shall not constitute a disclosure that violates this Order.

13. **Filing Under Seal:** Discovery protected by this Order shall be filed under seal in accordance with this Court's Local Rules and Sixth Circuit precedent. Such a filing does not limit or prohibit the right of a party challenge the confidential designation applied to discovery so filed. The Court requires compelling reasons to seal documents used in motions, particularly dispositive motions, regardless of any stipulation by the parties. The burden to establish those compelling reason rests with the party seeking maintain the discovery under seal.
14. **Inadvertent Failure to Designate:** In the event that a party discovers that confidential discovery has been inadvertently produced without the appropriate designation or protections required by this Order, the producing party may thereafter notify the party receiving such discovery under this Order and require the latter to retrieve and return any unmarked material and to substitute therefor appropriately marked material, provided (i) the producing party has initially taken reasonable measures to identify and designate the subject material, and (ii) the producing party notifies the receiving party promptly after learning of such inadvertent failure to designate. Upon receipt of such written notification from the producing party, the receiving party shall not after that disclose any such material or any information contained therein except as provided for in this Order.
15. **Inadvertent Production to Third Party:** Should an inadvertent disclosure of confidential discovery to a third party occur, the party making the inadvertent disclosure shall upon learning of it:
 - a. promptly notify the party to whom the disclosure was inadvertently made that it contains confidential discovery subject to this Order;
 - b. promptly make all reasonable efforts to recover the discovery as well as preclude further dissemination or use by the entity to whom disclosure was inadvertently made; and

- c. within ten days, notify the producing party of the identity of the entity to whom disclosure was inadvertently made, the circumstances surrounding disclosure, and the steps taken to recover the information and the steps taken to insure against the further dissemination or use of the discovery.

16. Challenge to Confidential Designation: An entity may challenge a designation of confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, an entity does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

- a. The challenging party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge.
- b. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice-to-voice dialogue; other forms of communication are not sufficient) within seven days of the date of service of notice. In conferring, the challenging party must explain the basis for its belief that the confidentiality designation was not proper and must give the designating party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging party may proceed to the next stage of the challenge process only if it has engaged in this meet-and-confer process first or establishes that the designating party is unwilling to participate in the meet-and-confer process in a timely manner.

- c. If the parties cannot resolve a challenge without court intervention, the designating party shall file and serve a motion to retain confidentiality within 14 days of the initial notice of challenge or within seven days of the parties agreeing that the meet-and-confer process will not resolve their dispute, whichever is earlier. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet-and-confer requirements imposed in the preceding paragraph.
 - d. Failure by the designating party to make such a motion including the required declaration within 14 days (or seven days, if applicable) shall automatically waive the confidentiality designation for each challenged designation.
 - e. In addition, the challenging party may file a motion challenging a confidentiality designation at any time if there is good cause for doing so, including a challenge to the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to this provision must be accompanied by a competent declaration affirming that the movant has complied with the meet-and-confer requirements imposed by the preceding paragraph.
 - f. In any challenge to the designation of discovery as confidential under this Order, the party asserting that designation bears the burden of proving by clear and convincing evidence that disclosure of the designated discovery will cause clearly-defined, irreparable harm to the producing party.
17. **Other Litigation:** By entering this Order and limiting the disclosure of information in this case, the Court does not intend to impair another court in any way from finding that discovery in this case is subject to disclosure in another case.
18. **Third-Party Requests.** Any person or party subject to this Order who receives a written request, subpoena, or court order seeking disclosure of confidential discovery, such person shall promptly (no more than ten days after receipt) notify counsel for the producing party of the request, subpoena, or court order and shall provide a copy of same.
19. **Duty to Maintain:** The recipient of confidential discovery that is provided under this Order shall maintain such discovery in a secure and safe area and shall exercise

the same standard of due and proper care with respect to the storage, custody, use and/or dissemination of such information as is exercised by the recipient with respect to its own proprietary information.

- 20. Return of Confidential Discovery:** Within 60 days after the final termination of this lawsuit, including any appeals, those in possession of confidential discovery shall return it to the producing party or destroy it and all copies of it. This paragraph shall not require the return or destruction of discovery filed in this Court, any regularly maintained litigation files held by the attorneys for each party as archival records, or other attorney work-product created for any party. Any confidential discovery not destroyed or returned shall remain subject to the terms of this Order.
- 21. Survival of Order:** This Order shall survive the termination of this lawsuit and this Court or any court of competent jurisdiction may exercise jurisdiction over this Order. Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until the producing party agrees otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be the later of (i) dismissal of all claims and defenses in this action, with or without prejudice and final judgment herein after the completion, and (ii) exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law.
- 22. Remedies for Breach:** A violation of this Order may be considered an act of contempt of this Court, subject to a determination by this Court that the requirements for such findings are satisfied.

It is so Ordered on _____ 2015.

THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

Kelvin & Katina Coleman

Plaintiffs

v.

No. 3:13-cv-1120 / Jury

Nixon/Griffin

Electrolux Home Products, Inc.

Defendant

EXHIBIT A TO PROTECTIVE ORDER

I hereby acknowledge that I have read the Protective Order entered by the Court in this lawsuit, that I am one of the persons contemplated as authorized to receive confidential discovery and that I fully understand and agree to abide by the obligations and conditions of the Protective Order. I agree to maintain any confidential discovery I receive in a separate and identifiable file, access to which is appropriately restricted. I hereby submit to the jurisdiction of this Court for the limited purpose of enforcing said Protective Order, and this Exhibit, by contempt proceedings or other appropriate judicial remedies.

Signature

Printed Name

Title or Position

Employer

Street Address

Wednesday, May 06, 2015
Knoxville, Tennessee

Respectfully submitted,
QUIST, CONE & FISHER, PLLC

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Certificate of Service

I hereby certify that on Wednesday, May 06, 2015 that I served this document by electronic mail to the following counsel of record through the following e-mail addresses:

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CASE LAW ON ENTERING PROTECTIVE ORDERS,
ENTERING SEALING ORDERS, AND MODIFYING
PROTECTIVE ORDERS

Committee on Rules of Practice and Procedure
(Prepared by Andrea Kuperman)
Updated July 2010

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Federal courts have extensive experience in evaluating requests for protective orders. Through the development of the case law, federal courts have grappled with competing interests involved in determining whether a protective order is warranted in various circumstances, and if so, the proper limits of the order. In evaluating requests for protective orders governing discovery, courts have considered various factors, including, for example, the confidentiality interests at issue, the need to protect public health and safety interests, the fairness and efficiency of entering a protective order, and the importance of the litigation to the public. The cases do not set out exhaustive factors and often emphasize that courts must maintain flexibility in analyzing requests for protective orders, explaining that the proper factors to consider will vary depending on the circumstances of each individual case.

Courts differentiate the standard for sealing documents filed with the court, which usually is much more exacting than the showing required for entering a protective order limiting the dissemination of discovery materials. In analyzing requests to seal court documents, courts emphasize the presumption of public access to judicial records and often require compelling reasons in order to seal court documents.

The case law also emphasizes that courts maintain discretion to modify protective orders, which can often act as a mechanism for protecting the interests of the public, the press, and collateral litigants. As with requests to grant protective orders, courts have developed standards for analyzing requests to modify protective orders. Although the circuits take various approaches to dealing with requests for modification, they have developed factors and standards that take into consideration the competing interests involved. Courts examining requests to modify protective orders often balance a variety of factors, including, for example, the continuing need for protection, the reliance interests

of those who produced discovery pursuant to a protective order, efficiency and fairness concerns, and the needs of the public, collateral litigants, and news organizations for the protected information.

The original version of this memo was completed in July 2009. It has now been updated to include cases through June 2010. The more recent cases do not indicate a substantive change in most of the general standards used for entering a protective order, for entering a sealing order, or for modifying a protective order. Some of the more recent case law emphasizes that there is no public right of access to unfiled discovery materials, and one recent case indicates that to the extent earlier cases relied on a presumption of public access to unfiled discovery, they have been superseded by the subsequent amendment to Federal Rule of Civil Procedure 5(d) that removed the obligation of filing all discovery materials.

In sum, the case law has developed flexible standards that have worked well for years in balancing the competing public and private interests implicated at various stages of litigation. Courts within each of the circuits have described the standards for evaluating requests to grant protective orders, requests to seal court documents, and requests to modify protective orders, as follows:

FIRST CIRCUIT

Standard for Entering a Protective Order

- The First Circuit has explained that protective orders can be used to promote the public interest by facilitating discovery:

Nor does public access to the discovery process play a significant role in the administration of justice. Indeed, if such access were to be mandated, the civil discovery process might actually be made more complicated and burdensome than it already is. In discovery, the parties are given broad range to explore “any matter, not privileged, which is relevant to the subject matter involved in the pending action” so that they may narrow and clarify the issues and

obtain evidence or information leading to the discovery of evidence for future use in the trial. *See* FED. R. CIV. P. 26(b)(1); *Hickman v. Taylor*, 329 U.S. [495,] 501, 67 S. Ct. [385,] 388 [(1947)]. The public's interest is in seeing that the process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals, just as it did in this case. The Supreme Court declined to apply heightened first amendment scrutiny to requests for protective orders at least in part because of these concerns. *See Seattle Times Co. [v. Rhinehart]*, 467 U.S. [20,] 36 n. 23, 104 S. Ct. [2199,] 2209 n. 23 [(1984)].

Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986).

- In another case, the First Circuit recognized that courts need discretion in order to appropriately handle requests for protective orders in various contexts:

District judges need wide latitude in designing protective orders, and the Federal Rules of Civil Procedure reflect that approach. Rule 26(c) generously permits “for good cause shown” the making of “any order which justice requires” to protect against annoyance, embarrassment or undue burden occasioned by discovery. The district court has “broad discretion” to decide “when a protective order is appropriate and what degree of protection is required,” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 2209, 81 L. Ed. 2d 17 (1984), and great deference is shown to the district judge in framing and administering such orders. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989); 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036 (1970).

Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993).

The court further recognized that while allowing the issuance of broad protective orders in discovery may have some costs, those costs are outweighed by the benefits of allowing litigation to proceed more efficiently:

The argument [that disclosure of discovery is warranted to avoid wasteful duplication of discovery in other cases] has a surface appeal in a time of swollen litigation cost and crowded dockets, but it looks

at only one element in the equation. Absent an immediate threat to public health or safety, the first concern of the court is with the resolution of the case at hand. Judges have found in many cases that effective discovery, with a minimum of disputes, is achieved by affording relatively generous protection to discovery material. Impairing this process has immediate costs, including the delay of discovery and the cost to the parties and the court of resolving objections that would not be made if a protective order were allowed.

Id. at 535. The First Circuit explained that public interests could still be protected, even with the issuance of broad protective orders:

Nevertheless, a protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.

This retained power in the court to alter its own ongoing directives provides a safety valve for public interest concerns, changed circumstances or any other basis that may reasonably be offered for later adjustment.

Id. (internal citation omitted).

- In another case, the First Circuit recognized that although parties may usually disclose materials obtained in discovery in the absence of a protective order, the public ordinarily has no right to compel private litigants to disclose materials gained in discovery:

Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants. [Local] Rule 16(g) does not in any way limit the use or dissemination of discovery materials by *parties*. Indeed, the Supreme Court has noted that parties have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31–36, 104 S. Ct. 2199, 2206–09, 81 L. Ed. 2d 17 (1984); *see also Oklahoma Hospital Ass’n v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905, 105 S. Ct. 3528, 87 L. Ed. 2d 652 (1985).

Pub. Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988).

Standard for Entering a Sealing Order

- The *Poliquin* court emphasized that once discovery material becomes part of the trial record, it can no longer be kept private without the party seeking confidentiality making a very high showing:

One generalization, however, is safe: the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial. This dividing line may in some measure be an arbitrary one, but it accords with long-settled practice in this country separating the presumptively private phase of litigation from the presumptively public. See *Cowley v. Pulsifer*, 137 Mass. 392 (1884) (Holmes, J.). Open trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal. See *Seattle Times Co.*, 467 U.S. at 33, 104 S. Ct. at 2207–08 (distinguishing discovery material, traditionally not available to the public, from trial evidence which normally is available).

There is thus an abiding presumption of access to trial records and ample reason to “distinguish materials submitted into evidence from the raw fruits of discovery.” *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678, 684 & n.28 (3d Cir. 1988). As we have said elsewhere, “[o]nly the most compelling reasons can justify the non-disclosure of judicial records.” *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (quoting *In re Knoxville News-Sentinal Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). Accord, *Joy v. North*, 692 F.2d 880, 893–94 (2d Cir. 1982).

Poliquin, 989 F.2d at 533.

- In another case, the First Circuit emphasized the presumption of public access to court documents. See *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 9–10 (1st Cir. 1998) (noting that “[t]he common law presumes a right of public access to judicial records” and that “[t]he presumption extends to records of civil proceedings” (citations omitted)). The court explained: “Though the public’s right of access to such materials is vibrant, it is not unfettered. Important countervailing interests can, in given instances, overwhelm the usual presumption and defeat access. It follows that when a party requests a seal order, or, as in this case, objects to an unsealing order, a court must carefully balance the competing interests that are at stake in the particular case.” *Id.* at 10 (internal citation omitted). The court explained that “[t]he mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access,” *id.*, but concluded that the interest in preserving attorney-client privilege “is precisely the kind of

countervailing concern that is capable of overriding the general preference for public access to judicial records,” *id.* at 11 (citations omitted). The court cautioned that even though sealing was appropriate to maintain attorney-client privilege under the facts of the case, the materials did not necessarily need to remain permanently sealed, and the seal could be lifted at a later time, if it turned out that claims of privilege were unsupported or that an exception applied. *See id.* at 12.

- In another case, the First Circuit noted that “[p]lacing court records out of public sight is a serious step, which should be undertaken only rarely and for good cause.” *R & G Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 584 F.3d 1, 12 (1st Cir. 2009). The court explained that “[s]ealing orders are not like party favors, available upon request or as a mere accommodation.” *Id.* (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–99 (1978); *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005)). The appellate court did not decide whether sealing was proper in that case because “decisions about whether or not to seal are committed to the sound discretion of the district court,” and the lack of a timely challenge to the sealing order precluded full review on appeal. *Id.* The court noted that permissive intervention is an appropriate means for a third party to challenge a sealing order. *See id.* at 11 (“When a third party essays a challenge to a sealing order, permissive intervention is the procedurally correct vehicle.” (citing *Pub. Citizen*, 858 F.2d at 783)).

Standard for Modifying a Protective Order

- The First Circuit has questioned whether “extraordinary circumstances” are necessary to modify a protective order, distinguishing a Second Circuit case that applied that standard. *See Pub. Citizen*, 858 F.2d at 791 (stating that it was “not convinced that the extraordinary circumstances standard” proffered by the appellants was applicable because the decision relied upon, *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979), had focused on “the fact that the party seeking access . . . was the federal government, which . . . had at its disposal investigatory powers not available to private litigants” (internal quotation marks and citation omitted)).¹ Instead, the court held that a more lenient standard for modification would apply:

Outside the area of government intervention, courts have applied much more lenient standards for modification. *See e.g., Wilk [v. Am. Med. Ass’n]*, 635 F.2d [1295,] 1300 [(7th Cir. 1980)] (holding that the court’s prior invocation of the extraordinary circumstances test “was an unfortunate choice of words”); *Tavoulaareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984)

¹ The Second Circuit has more recently emphasized that its opinion in *Martindell* was not limited to requests by the government to modify a protective order. *See SEC v. TheStreet.com*, 273 F.3d 222, 229 n.7 (2001) (“Some district courts in our Circuit have incorrectly concluded that the *Martindell* rule only applies when the Government seeks modification of a protective order. Though *Martindell* did involve a Government request to modify a protective order, its logic is not restricted to Government requests, nor did our opinion in *Martindell* suggest otherwise.” (internal citation omitted)).

(suggesting that the good cause standard of Rule 26(c) governs modifications of protective orders). While we need not decide the matter definitively, we reject the “extraordinary circumstances” standard. In a case such as this, where the party seeking modification has pointed to some relevant change in the circumstances under which the protective order was entered, we think that a standard less restrictive than “extraordinary circumstances” is appropriate.

Id. at 791. The court concluded that it did not need to define the contours of the standard because the relevant facts of the case showed that the district court had power to modify its prior protective order. The court relied on the fact that the reasons underlying the initial order no longer existed and the fact that public interest considerations favored allowing counsel to make certain documents public. *Id.* at 791–92.

- A district court in the First Circuit recently explained that the exact standard for modifying a protective order is not clearly defined in the First Circuit: “While the First Circuit has not definitively resolved the matter of the standard applicable to modification of a protective order, it has expressed the view that ‘a standard less restrictive than ‘extraordinary circumstances’ is appropriate[,]’ noting that other courts have applied ‘much more lenient standards for modification[,]’ including the standard of ‘good cause.’” *Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.*, No. 08-158-P-H, 2009 WL 1210638, at *1 (D. Me. Apr. 30, 2009) (alterations in original) (quoting *Pub. Citizen*, 858 F.2d at 791). The court held that the party seeking modification bears the burden of showing good cause for the modification. *Id.* The court also noted that “[w]hen a party to a *stipulated* protective order seeks to modify that order, that party must demonstrate particular good cause to obtain relief.” *Id.* at *1 n.5 (quoting *Guzhagin v. State Farm Mut. Auto Ins. Co.*, Civil No. 07-4650 (JRT/FLN), 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (citation and internal quotation marks omitted) (emphasis in original)).

SECOND CIRCUIT

Standard for Entering a Protective Order

- In discussing public access to discovery documents, the Second Circuit has stated:

[I]t must be recognized that an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power. The relevance or reliability of a statement or document generally cannot be determined until heard or read by counsel, and, if necessary, by the court or other judicial officer. As a result, the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material.

United States v. Amodeo (Amodeo II), 71 F.3d 1044, 1048 (2d Cir. 1995). As a result of the fact that many documents unearthed in discovery are not relevant to judicial actions, the Second Circuit explained: “Unlimited access to every item turned up in the course of litigation would be unthinkable. Reputations would be impaired, personal relationships ruined, and businesses destroyed on the basis of misleading or downright false information.” *Id.* at 1048–49. The *Amodeo II* court set out the following standard: “We believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court’s purview solely to insure their irrelevance.” *Id.* at 1049. The court recognized a presumption of public access to documents involved in litigation, but explained that “[d]ocuments that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond the presumption’s reach, and ‘stand[] on a different footing than . . . a motion filed by a party seeking action by the court,’ or, indeed, than any other document which is presented to the court to invoke its powers or affect its decisions.” *Id.* at 1050 (emphasis added) (second alteration in original) (internal citations omitted).

- In another case, the Second Circuit explained the standard for entering a protective order:

The district court has broad discretion to determine whether an order should be entered protecting a party from disclosure of information claimed to be privileged or confidential. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973). Where, as here, the documents are relevant, the burden is upon the party seeking non-disclosure or a protective order to show good cause.

Penthouse Int’l, Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 391 (2d Cir. 1981) (citations omitted).

- A court within the Second Circuit has explained that public interest also must factor into the determination of whether to grant a protective order:

The test for entering a protective order under FED. R. CIV. P. 26(c) is “good cause.” *See, e.g., Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 18–19 (2d Cir. 1992); *Bank of New York v. Meridien Biao Bank Tanzania*, 171 F.R.D. 135, 143 (S.D.N.Y. 1997). In assessing a party’s application for such relief, the court must balance the demonstrated interest of the applicant in the secrecy of the information in question against not only the prejudice, if any, to the opposing party, but also the recognized federal common-law interest of the public in access to court proceedings. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99 (1978);

DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 826 (2d Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998); *United States v. Amodeo*, 71 F.3d 1044, 1053 (2d Cir. 1995).

Byrnes v. Empire Blue Cross Blue Shield, No. 98 Civ. 8520 BSJ MHD, 2000 WL 60221, at *1 (S.D.N.Y. Jan. 25, 2000) (footnote omitted). The court recognized that the public's interest in litigation materials depends on the stage of the litigation:

Since the articulated public interest is in court proceedings, the weight of the interest varies depending upon the role the information in question plays in the adjudicative process. At one end of the spectrum is information produced to a litigant in discovery. Most discovery, including document production, typically takes place privately. Moreover, given the liberal standards that govern discovery, it is often the case that much of the information actually turned over has little or no significance for the resolution of the claims and defenses or other issues presented to the court in the course of the litigation. For these reasons, the public interest in access to discovery materials is recognized as generally of a limited order, although most courts have held that the producing party still has the burden of demonstrating good cause for preventing public access to discovery materials. In contrast, the public interest in access to the proceedings of the court is a central and compelling policy consideration, and that policy dictates that the party seeking a protective order must satisfy a more demanding standard to justify sealing portions of trials, other court hearings or papers filed with the court, including motion papers.

Id. (internal citations omitted).

- The Second Circuit recently noted that “[t]he disclosure of confidential information on an ‘attorneys’ eyes only’ basis is a routine feature of civil litigation involving trade secrets.” *Dinler v. City of New York (In re The City of New York)*, --- F.3d ----, 2010 WL 2294134, at *7 (2d Cir. Jun. 9, 2010) (citing FED. R. CIV. P. 26(c)(1)(G) (“The court may, for good cause, issue an order to protect a party . . . including . . . requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way”)) (omissions in original)).

Standard for Entering a Sealing Order

- The Second Circuit has emphasized that sealing documents associated with dispositive motions requires a very high showing. In *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 113 (2d Cir. 2006), the Second Circuit concluded that the district court had erred by holding in abeyance a motion by the press to intervene to access sealed documents filed in

connection with a summary judgment motion because “the contested documents are judicial documents to which a presumption of immediate access applies under both the common law and the First Amendment.” The court explained that “[t]he common law right of access to judicial documents is firmly rooted in our nation’s history,” and stated:

The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

Id. at 119 (quotation marks omitted) (quoting *Amodeo II*, 71 F.3d at 1048). The *Lugosch* court explained that “in order to be designated a judicial document, ‘the item filed must be relevant to the performance of the judicial function and useful in the judicial process.’” *Id.* (quoting *United States v. Amodeo (Amodeo I)*, 44 F.3d 141, 145 (2d Cir. 1995)). The court noted that once a “court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the weight of that presumption,” which is “governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts,” *id.* (quoting *Amodeo II*, 71 F.3d at 1049). Then, “after determining the weight of the presumption of access, the court must ‘balance competing considerations against it,’” which “include but are not limited to ‘the danger of impairing law enforcement or judicial efficiency’ and ‘the privacy interests of those resisting disclosure.’” *Id.* at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

The *Lugosch* court also explained that “[i]n addition to the common law right of access, it is well established that the public and the press have a ‘qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.’” *Id.* (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). The court elaborated:

We have articulated two different approaches for determining whether “the public and the press should receive First Amendment

protection in their attempts to access certain judicial documents.” [Hartford Courant, 435 F.3d] at 92. The so-called “experience and logic” approach requires the court to consider both whether the documents “have historically been open to the press and general public” and whether “public access plays a significant positive role in the functioning of the particular process in question.” *Id.* (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). “The courts that have undertaken this type of inquiry have generally invoked the common law right of access to judicial documents in support of finding a history of openness.” *Id.* The second approach considers the extent to which the judicial documents are “derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings.” *Id.* at 93.

Lugosch, 435 F.3d at 120 (second alteration in original) (footnote omitted). However, even if a court determines that documents are entitled to a qualified First Amendment right of access, “[d]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks omitted)). “Broad and general findings by the trial court, however, are not sufficient to justify closure.” *Id.* (quoting *In re New York Times*, 828 F.2d at 116).

The court noted that Second Circuit “precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.” *Id.* at 121. As a result, the court concluded that “documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.” *Id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). The court continued: “The justification offered in *Joy v. North* for this conclusion is that summary judgment is an adjudication, and ‘[a]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.’” *Id.* (alteration in original) (quoting *Joy*, 692 F.2d at 893).

In addition, the *Lugosch* court emphasized that in evaluating whether court documents may be sealed from the press, the court should not consider the press’s motive in seeking access:

Although the presumption of access is based on the need for the public monitoring of federal courts, those who seek access to particular information may want it for entirely different reasons. However, we believe motive generally to be irrelevant to defining the weight accorded the presumption of access. It is true that journalists may seek access to judicial documents for reasons unrelated to the

monitoring of Article III functions. Nevertheless, assessing the motives of journalists risks self-serving judicial decisions tipping in favor of secrecy. Where access is for the purpose of reporting news, moreover, those interested in monitoring the courts may well learn of, and use, the information whatever the motive of the reporting journalist.

435 F.3d at 123 (quoting *Amodeo II*, 71 F.3d at 1050) (quotation marks omitted).

The *Lugosch* court noted that even where both a common law and First Amendment right of access attaches, documents can be sealed in some circumstances:

Notwithstanding the presumption of access under both the common law and the First Amendment, the documents may be kept under seal if “countervailing factors” in the common law framework or “higher values” in the First Amendment framework so demand. Since we have concluded that the more stringent First Amendment framework applies, continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.

Id. at 124 (citing *In re New York Times*, 828 F.2d at 116).

Finally, the court emphasized that documents may not remain sealed simply because parties relied on a discovery protective order in producing documents:

[T]he argument that the defendants’ reliance on [the confidentiality order] during years of discovery shields them now from the burden of justifying protection of the documents ignores the fact that civil litigants have a legal obligation to produce all information “which is relevant to the subject matter involved in the pending action,” FED. R. CIV. P. 26(b)(1), subject to exceptions not involved here. Thus, defendants cannot be heard to complain that their reliance on the protective order was the primary cause of their cooperation during years of discovery: even without [the confidentiality order], I would eventually have ordered that each discoverable item be turned over to the plaintiffs. Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) or countenanced by the common law of access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right.

Id. at 125–26 (alterations in original) (quotation marks omitted) (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43–44 (C.D. Cal. 1984)).

- The Second Circuit recently reemphasized the standard set out in *Lugosch*. In *Standard Investment Chartered, Inc. v. Financial Industry Regulatory Authority, Ind.*, 347 F. App'x 615 (2d Cir. 2009) (unpublished summary order), the court stated:

The District Court properly recognized that the normal burden upon the proponent of a protective order to establish good cause for protection, *see* [*Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004)], is significantly enhanced with respect to “judicial documents,” *see* *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006), as to which “a common law presumption of access attaches,” *id.* We have described “judicial documents” as those that are “‘relevant to the performance of the judicial function,’” *id.* . . . at 119 (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir.1995)), but we have also said that the monitoring of the judicial function is not possible without access to “documents that are *used* in the performance of Article III functions,” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“*Amodeo II*”) (emphasis added). . . . The District Court also recognized the extra force in favor of disclosure supplied by the qualified First Amendment right of access that we discussed in *Lugosch*, 435 F.3d at 120. However, *Lugosch* pointed out that even this qualified First Amendment right of access “does not end the inquiry.” *Id.* Analogizing to the courtroom closure context, we observed that “[d]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* (quoting *In re New York Times*, 828 F.2d 110, 116 (2d Cir. 1987)).

Id. at 616–17 (second alteration in original). The court emphasized that “[w]here testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason.” *Id.* at 617 (quoting *Amodeo II*, 71 F.3d at 1050).

- The Second Circuit has also noted that “several ‘competing interests [have been weighed] in a variety of contexts in determining whether to grant access to judicial documents’” *SEC v. TheStreet.com*, 273 F.3d 222, 231 n.10 (2d Cir. 2001) (quoting *Amodeo I*, 44 F.3d at 147 (citations omitted)). The court also noted:

[T]he public has in the past been excluded, temporarily or permanently from . . . the records of court proceedings to protect

private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.

We have [elsewhere] recognized the law enforcement privilege as an interest worthy of protection.

Id. (alterations in original) (quotation marks omitted) (quoting *Amodeo I*, 44 F.3d at 147 (citations omitted)). *TheStreet.com* court explained that in *Amodeo II*, the court had found that once the document at issue had been deemed a judicial document, the next step was to “determine the weight of the presumption of public access by evaluating ‘the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.’” *Id.* at 232 (quoting *Amodeo II*, 71 F.3d at 1049). The court explained that once the weight of the presumption of public access is determined, a court should “‘balance [the] competing considerations against [that presumption],’” *id.* (alterations in original) (quoting *Amodeo II*, 71 F.3d at 1050), including at least two countervailing factors: “(1) the danger of impairing law enforcement or judicial efficiency; and (2) the privacy interests of those who resist disclosure,” *id.* With respect to the latter countervailing factor, the court stated that “‘the privacy interests of innocent third parties . . . should weigh heavily in a court’s balancing equation,’” and that “‘the weight of the privacy interest should depend on ‘the degree to which the subject matter is traditionally considered private rather than public.’” *Id.* (quoting *Amodeo II*, 71 F.3d at 1050, 1051). The court also stated that “‘a court should consider ‘the nature and degree of injury’ as well as whether ‘there is a fair opportunity for the subject to respond to any accusations contained therein.’” *TheStreet.Com*, 273 F.3d at 232 (quoting *Amodeo II*, 71 F.3d at 1051).

Standard for Modifying a Protective Order

- The Second Circuit has set forth a restrictive standard for modifying a protective order: “Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) ‘absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.’” *TheStreet.com*, 273 F.3d at 229 (alteration in original) (quoting *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)).² The Second Circuit emphasized the importance

² In the related context of whether a grand jury subpoena can trump a protective order entered in civil litigation, the circuits have split as to the proper approach. *See, e.g., In re Grand Jury*, 286 F.3d 153, 156, 158 (3d Cir. 2002) (noting that the Second Circuit has adopted a rule that “absent a showing of improvidence in the grant of the protective order, or extraordinary circumstance or compelling need for the information, a protective order takes priority over a grand jury subpoena,” but that “[t]his presumption in favor of enforcing protective orders against grand jury subpoenas has been rejected by several courts” in favor of “a *per se* rule that a grand jury subpoena always trumps a protective order,” and joining the First Circuit’s intermediate approach by holding that “a grand jury subpoena supercedes a civil protective order unless the party seeking to avoid the subpoena demonstrates the existence of exceptional circumstances that clearly favor enforcement of the protective order” (citations omitted)); *In re Grand Jury Subpoena*, 138 F.3d 442, 444–45 (1st

Cir. 1998) (noting that “[t]he Second Circuit’s rule—positing a presumption in favor of a protective order when such an order clashes with a grand jury subpoena—has received a cool reception elsewhere,” and that several other circuits have adopted “a per se rule that invariably prefers grand jury subpoenas over civil protective orders,” but finding neither approach appropriate and adopting instead a modified per se rule that “[a] grand jury’s subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order” (citations omitted)); *United States v. Janet Greeson’s A Place for Us, Inc. (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*, 62 F.3d 1222, 1226 (9th Cir. 1995) (rejecting the Second Circuit’s compelling need test and adopting the Fourth and Eleventh Circuits’ per se approach that “a grand jury subpoena should, as a matter of course, prevail over a protective order”); *Williams v. United States (In re Grand Jury Proceedings)*, 995 F.2d 1013, 1015, 1017, 1018–20 (11th Cir. 1993) (rejecting the strict *Martindell* test in the context of grand jury subpoenas, in part because while “protective orders help district courts resolve civil matters, [the court could not] agree with the Second Circuit that they are the ‘cornerstone of our administration of civil justice,’” and finding the *Martindell* test “administratively unworkable” in the context of grand jury subpoenas); *United States v. (Under Seal) (In re Grand Jury Subpoena)*, 836 F.2d 1468, 1477 (4th Cir. 1988) (adopting a per se rule that “a reasonable balancing of the respective interests of the civil courts and grand jury investigations favors enforcement of a grand jury subpoena despite the existence of an otherwise valid protective order”). The Fourth Circuit noted that *Martindell* “concerned an informal government request to a federal district court for copies of deposition transcripts which were the subject of a Rule 26 protective order” and “did not express an opinion on how these interests should be balanced when a grand jury subpoena seeks to override a valid protective order.” *In re Grand Jury Subpoena*, 836 F.2d at 1473. *Martindell* disapproved of the government’s informal request for protected discovery. *See Martindell*, 594 F.2d at 294 (“The Government may not, however, simply by picking up the telephone or writing a letter to the court (as was the case here), insinuate itself into a private civil lawsuit between others. The proper procedure, as the Government should know, was either to subpoena the deposition transcripts for use in a pending proceeding such as a grand jury investigation or trial, in which the issue could be raised by motion to quash or modify the subpoena, see Rule 17(c), F. R. CRIM. P., or to seek permissive intervention in the private action pursuant to Rule 24(b), F. R. CIV. P., for the purpose of obtaining vacation or modification of the protective order.” (citations omitted)).

In adopting the intermediate approach, the Third Circuit noted that “[a] protective order is an important device, but it is also a limited one, and is subject to modification.” *In re Grand Jury*, 286 F.3d at 161 (citation omitted). The court stated:

Protective orders are limited instruments that are quite useful in facilitating the efficient disposition of litigation in the many civil cases that involve potentially embarrassing facts or sensitive commercial or other private information. Yet deponents who have reason to fear not just embarrassment or economic disadvantage, but possible criminal charges as well, should be aware that a protective order alone cannot protect them from a grand jury investigation.

Id. The Third Circuit also pointed out that determining whether a party has shown exceptional circumstances to warrant enforcing a protective order in the face of a grand jury subpoena involves a case-by-case analysis, and provided a non-exhaustive list of several factors courts might consider:

- 1) the government’s need for the information (including the availability of other sources);
- 2) the severity of the contemplated criminal charges;
- 3) the harm to society should the alleged criminal wrongdoing go unpunished;
- 4) the interests served by continued maintenance of complete confidentiality in the civil litigation;
- 5) the value of the protective order to the timely resolution of that litigation;
- 6) the harm to the party who sought the protective order if the information is revealed to the grand jury;
- 7) the severity of the harm alleged by the civil-suit plaintiff; and
- 8) the harm to society and the parties should the encroachment upon the protective order hamper the prosecution or defense of the civil case.

of parties being able to rely on protective orders:

[P]rotective orders issued under Rule 26(c) serve “the vital function . . . of ‘secur[ing] the just, speedy, and inexpensive determination’ of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice.” Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless “annoyance, embarrassment, oppression, or undue burden or expense.” Rule 26(c). And if previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future.

Id. at 229–30 (omissions and second alteration in original) (footnote and internal citation omitted). The Second Circuit warned against the effects of granting requests to modify protective orders without a compelling reason:

If protective orders were easily modified, moreover, parties would be less forthcoming in giving testimony and less willing to settle their disputes: “Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation” *Martindell*, 594 F.2d at 295. Indeed, we have observed that protective orders can provide a powerful incentive to deponents who would not otherwise testify. *Id.* at 296 (finding that “the deponents testified in reliance upon the Rule 26(c) protective order, absent which they may have refused to testify”).

Id. at 230. The court concluded that “another compelling reason to discourage modification of protective orders in civil cases is to encourage testimony in pre-trial discovery proceedings and to promote the settlement of disputes.” *Id.* In addition to focusing on the parties’ reliance on protective orders, the Second Circuit noted the unfairness of modifying protective orders. *Id.* (“It is . . . presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied.”). However, the Second Circuit emphasized that to avoid modification, the parties’ reliance must be reasonable, explaining that “protective orders that are on their face temporary or limited may not justify reliance by the parties.” *Id.* at 231.

- Another court in the Second Circuit recently discussed the standard for modifying a protective order: “In the Second Circuit, where there has been reasonable reliance by a party

Id. at 162 (citing *In re Grand Jury Subpoena*, 138 F.3d at 445).

or deponent on the confidentiality order in giving testimony or producing materials, a district court should not modify an order granted under 26(c) “absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.”” *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 317 (D. Conn. 2009) (citing *TheStreet.com*, 273 F.3d at 229). The *EPDM* court recognized that the Second Circuit approach is stricter than other circuits:

This presumption [in the Second Circuit] against modification differs from the standard in other circuits, which have a presumption in favor of access in cases where an intervening party involved in bona fide collateral litigation seeks access to protected discovery materials. *See, e.g., United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1980). *See also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 789–90 (3rd Cir. 1994) (rejecting Second Circuit approach); *Beckman Industries, Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992) (same); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988) (same). In those circuits, modification is favored when it will “place private litigants in a position they would otherwise reach only after repetition of another’s discovery.” *Wilk*, 635 F.2d at 1299. A trial court should deny modification only where it would “tangibly prejudice substantial rights of the party opposing modification.” *Id.* The desire to make litigation more burdensome to pursue in the collateral jurisdiction “is not legitimate prejudice.” *United Nuclear Corp.*, 905 F.2d at 1428. Any legitimate interest the defendants have in keeping the materials filed under the protective order out of public hands can be accommodated by placing the intervening party under the same use and disclosure restrictions contained in the original order. *Id.* *See also [In re] Linerboard [Antitrust Litig.]*, 333 F. Supp. 2d [333,] 339–40 [(E.D. Pa. 2004)] (allowing modification on the condition that the Canadian third-party intervenor be bound by the protective order’s use and disclosure requirements and submit to the personal jurisdiction of the court for purposes of enforcing the agreement); [*In re] Neurontin [Mktg., Sales Practices, & Prods. Liab. Litig.]*, MDL Docket No. 1629 (D. Mass. Oct. 13, 2006) (order granting motion to intervene) (same).

Id. at 317–18 (footnote omitted).

The court emphasized that the strict Second Circuit standard for modifying a protective order applies only if the parties *reasonably* relied on the order:

[T]hough the *Martindell* standard is admittedly a stringent one, it

does not apply uniformly to *all* protective orders. *Id.* Rather, the application of the strong presumption against modification is dependent upon a protective order's particular characteristics and whether it invites reasonable reliance on the permanence of the order. *Id.* "Even the Second Circuit recognizes that there must be a plausible showing of reliance on the order to narrow the grounds for modification." 8 WRIGHT & MILLER § 2044.1. For example, where the deponent or party could not have reasonably relied on the protective order to continue indefinitely, "a court may properly permit modification of the order." *TheStreet.com*, 273 F.3d at 231. In *TheStreet.com*, the Court concluded that the *Martindell* presumption against access did not apply to the protective order at issue because the deponents, unlike in *Martindell*, had not provided their depositions in reasonable reliance on the protective order. *Id.* at 233. Absent such reliance, the *Martindell* standard "never came into play," and therefore the lower court's decision to modify the order after balancing the parties' interests was within the scope of its discretion. *Id.* at 234.

Id. at 318. The *EPDM* court described the factors used to consider whether the parties have reasonably relied on a protective order:

Application of the *Martindell* presumption against modification depends on the nature of the protective order and whether it invited reasonable reliance by a party or deponent. An examination of Second Circuit case law reveals the following factors are relevant when determining whether a party has reasonably relied on the protective order: (1) the scope of the protective order; (2) the language of the order itself; (3) the level of inquiry the court undertook before granting the order; and (4) the nature of reliance on the order. Additional considerations that may influence a court's decision to grant modification include: the type of discovery materials the collateral litigant seeks and the party's purpose in seeking a modification. Given the wide variety of protective orders in operation, the more flexible approach to modification emphasized by *TheStreet.com* is sensible.

Id. at 318–19.

The court explained that the type of protective order under consideration affects the determination of whether the parties reasonably relied upon it:

When considering a motion to modify, it is relevant whether the order is a blanket protective order, covering all documents and

testimony produced in a lawsuit, or whether it is specifically focused on protecting certain documents or certain deponents for a particular reason. A blanket protective order is more likely to be subject to modification than a more specific, targeted order because it is more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition. “Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification.” Stipulated blanket orders are even less resistant to a reasonable request for modification.

Id. at 319 (internal citations omitted).

Parties also may not reasonably rely on a protective order that expressly limits its applicability: “Where a protective order contains express language that limits the time period for enforcement, anticipates the potential for modification, or contains specific procedures for disclosing confidential materials to non-parties, it is not reasonable for a party to rely on an assumption that it will never be modified.” *Id.* at 320 (citing *TheStreet.com*, 273 F.3d at 231). Further, “[e]xpress provisions of an order permitting non-parties to seek access to the protected materials will diminish the reasonableness of reliance a party claims to place on the order’s permanent secrecy.” *EPDM*, 255 F.R.D. at 320. “Courts evaluating the language of stipulated agreements between the parties must interpret the order ‘as its plain language dictates.’” *Id.* (citation omitted).

In addition, the modification analysis described by the *EPDM* court includes consideration of the extent to which the district court examined the protective order initially:

Whether a protective order is entitled to *Martindell’s* strong presumption against modification is also dependent upon the circumstances surrounding its grant, i.e., how much consideration the court gave to the request for a protective order before granting it. A protective order granted on the basis of a stipulation by the parties carries less weight than a protective order granted after a hearing to show good cause.

The heightened *Martindell* “extraordinary circumstances” standard applies where a court has already “considered each document in the first instance according to a ‘good cause’ standard” and is not appropriate in cases with stipulated protective orders that grant parties “open-ended and unilateral deference” to protect whichever discovery materials they choose.

Id. at 321 (internal citations omitted).

Further, the modification analysis considers the degree of reliance, such as whether a party produced documents it was not required to produce in reliance on the provisions of a protective order:

Where a party or deponent, in reliance on the protective order, gives up its right to refuse to testify, or to produce documents it would not otherwise be compelled to produce, the heightened *Martindell* presumption against modification naturally applies. “The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case.”

Id. at 322 (citation omitted). The court further explained:

Conversely, where the parties have not given up any rights and indeed would have been compelled to produce the discovery materials even in the absence of a protective order, the presumption against modification is not as strong. In such cases, the protective order has been granted to parties concerned about disclosing non-public information and as a convenience to avoid time-consuming discovery disputes and document-by-document good cause showings.

Id. at 323.

Finally, the *EPDM* court discussed several other factors relevant to the modification analysis:

Although the type of materials sought by an intervenor does not affect the nature of reliance on the protective order by the existing parties, it is another important factor for a court to consider when deciding a motion to modify. Whether the collateral litigant could retrieve the same materials in question through its own discovery requests or whether it is attempting to subvert a limitation on discovery, such as the close of the factual record, should be taken into account. Certainly if the litigant could access the same materials and deposition testimony by conducting its own discovery, it is in the interest of judicial efficiency to avoid such duplicative discovery. *See* 8 WRIGHT & MILLER § 2044.1 (noting that modification in these situations prevents litigants from having to “reinvent the wheel”). However, if the intervenor is seeking to circumvent limitations on its ability to conduct discovery in its own case or to gain access to materials it would otherwise have no right to access, a court should refuse to modify the protective order.

Id. at 324 (citation omitted). The court also concluded that the purpose for which modification is sought is a factor to be considered:

A litigant's *purpose* in seeking modification of an existing protective order is also relevant for determining whether to grant a modification. Requests to modify protective orders so that the public may access discovery materials is arguably subject to a more stringent presumption against modification because there is no public right of access to discovery materials. *TheStreet.com*, 273 F.3d at 233. In the absence of a compelling need for the public to access sealed documents, courts have generally been reluctant to disturb discovery protective orders for public dissemination.

EPDM, 255 F.R.D. at 324.

THIRD CIRCUIT

Standard for Entering a Protective Order

- The Third Circuit has stated:

A party seeking a protective order over discovery materials must demonstrate that “good cause” exists for the protection of that material. FED. R. CIV. P. 26(c); *Pansy [v. Borough of Stroudsburg]*, 23 F.3d [772,] 786 [(3d Cir. 1994)]. “Good cause” is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. *Id.* Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice. *Id.*

Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995). The *Glenmede* court set forth factors that it described as “neither mandatory nor exhaustive,” that could be considered in determining whether “good cause” exists for granting a protective order. *Id.* These factors include:

- 1) whether disclosure will violate any privacy interests;
- 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
- 3) whether disclosure of the information will cause a party embarrassment;
- 4) whether confidentiality is being sought over *information important to public health and safety*;

5) whether the sharing of information among litigants will promote fairness and efficiency;

6) whether a party benefitting from the order of confidentiality is a public entity or official; and

7) whether the case involves issues important to the public.

Id. (emphasis added) (quotation marks omitted) (quoting *Pansy*, 23 F.3d at 787–91).

The *Glenmede* court “recognized that the district court is best suited to determine what factors are relevant to the dispute,” but “cautioned that the analysis should always reflect a balancing of private versus public interests.” *Id.*; see also *Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) (“*Pansy* emphasized that a court always must consider the public interest when deciding whether to impose a protective order.” (citation omitted)).

The *Glenmede* court also recognized the importance of open court proceedings, particularly to allow those who may have related claims to observe the proceedings, stating:

Federal courts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information. The sharing of information among current and potential litigants is furthered by open proceedings. . . . Absent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue.

Glenmede, 56 F.3d at 485 (footnote omitted).

Glenmede emphasized the importance of judicial oversight to ensure that information that is appropriately in the public domain remains accessible, rejecting a rule that would require the issuance of protective orders to protect privileged materials sought in discovery until all avenues of appeal are exhausted because “[s]uch a rule would be tantamount to permitting the parties to control the use of protective orders.” *Id.* (footnote omitted).

- Another Third Circuit case has explained:

In the context of discovery, it is well-established that a party wishing to obtain an order of protection over discovery material must demonstrate that “good cause” exists for the order of protection. FED. R. CIV. P. 26(c); *Smith v. Bic Corp.*, 869 F.2d 194, 199 (3d Cir. 1989). . . . Protective orders over discovery materials and orders of confidentiality over matters relating to other stages of litigation have comparable features and raise similar public policy concerns. All such orders are intended to offer litigants a measure of privacy, while

balancing against this privacy interest the public’s right to obtain information concerning judicial proceedings. Also, protective orders over discovery and confidentiality orders over matters concerning other stages of litigation are often used by courts as a means to aid the progression of litigation and facilitate settlements. Protective orders and orders of confidentiality are functionally similar, and require similar balancing between public and private concerns. We therefore exercise our inherent supervisory power to conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order. *Cf. City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) (“We do not . . . give parties *carte blanche* either to seal documents related to a settlement agreement or to withhold documents they deem so ‘related.’ Rather, the trial court—not the parties themselves—should scrutinize every such agreement involving the sealing of court papers and [determine] what, if any, of them are to be sealed, and it is only after very careful, particularized review by the court that a Confidentiality Order may be executed.”).

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) (alteration and second omission in original) (footnote omitted). The court continued:

“Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.” *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,” do not support a good cause showing. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487, 98 L. Ed. 2d 485 (1987). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order. *Id.* at 1122.

Id. at 786–87. The court elaborated:

In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432–33 (1991). The balancing conducted in the discovery context should be applied by courts when considering whether to grant confidentiality orders at any stage of litigation, including settlement:

[T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.

Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c)(7) Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. at 787 (alterations and omissions in original) (quoting Miller, *supra*, 105 HARV. L. REV. at 433–35 (footnotes omitted)).

The court noted the need for flexibility in analyzing requests for protective orders:

The factors discussed above are unavoidably vague and are of course not exhaustive. Although the balancing test discussed above may be criticized as being ambiguous and likely to lead to unpredictable results, we believe that such a balancing test is necessary to provide the district courts the flexibility needed to justly and properly consider the factors of each case.

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of [confidentiality] orders and the unnecessary denial of confidentiality for information that deserves it

Id. at 789 (alteration and omission in original) (quoting Miller, *supra*, 105 HARV. L. REV. at 492).

Standard for Entering a Sealing Order

- The Third Circuit has recognized a right of public access to judicial proceedings, *see, e.g., In re Cendant Corp. v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001), and has explained that “[t]he status of a document as a ‘judicial record,’ . . . depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings,” *id.* The *Cendant* court explained that sealing parts of the judicial record requires a particularized showing:

In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record “bears the burden of showing that the material is the kind of information that courts will protect” and that “disclosure will work a clearly defined and serious injury to the party seeking closure.” In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. As is often the case when there are conflicting interests, a balancing process is contemplated. “[T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption.”

Id. at 194 (internal citations omitted). The *Cendant* court emphasized that in the limited circumstances in which sealing is warranted, the seal should be lifted as soon as practicable: “Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain.” *Id.* at 196.

Standard for Modifying a Protective Order

- In *Pansy*, the Third Circuit explained that in considering whether to modify a protective order, the court must evaluate the degree of reliance by the parties on the order. *Pansy*, 23 F.3d at 789 (“In determining whether to *modify* an already-existing confidentiality order, the parties’ reliance on the order is a relevant factor.”). The court recognized that the various circuits accord different weight to the parties’ reliance as a factor in determining whether modification of a protective order is appropriate. *See id.* The court noted that the Second Circuit had “announced a stringent standard for modification, holding that a confidentiality order can only be modified if an extraordinary circumstance or compelling need warrants the requested modification.” *Id.* (citations omitted). The court also noted that “[o]ther courts of appeals have rejected this stringent standard, [and] have held that a more lenient test for modification applies, but have failed to articulate precisely what that standard is.” *Id.* (citations omitted). The Third Circuit determined that a standard less stringent than the Second Circuit’s approach was appropriate:

We agree with these courts that the standard of the Court of Appeals for the Second Circuit for modification is too stringent. The appropriate approach in considering motions to modify confidentiality orders is to use the same balancing test that is used in determining whether to grant such orders in the first instance, with one difference: one of the factors the court should consider in determining whether to modify the order is the reliance by the original parties on the confidentiality order. The parties' reliance on an order, however, should not be outcome determinative, and should only be one factor that a court considers when determining whether to modify an order of confidentiality.

Id. at 790 (footnote omitted). The court continued:

The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case. For instance, reliance would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege

. . . Reliance will be less with a blanket order, because it is by nature overinclusive.

Id. at 790 (quotation marks omitted) (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992)). The court also emphasized that parties could not rely on a protective order that was not properly granted in the first place:

“[R]eliance on [confidentiality] orders [will] not insulate those orders from subsequent modification or vacating if the orders were improvidently granted *ab initio* [N]o amount of official encouragement and reliance thereon could substantiate an unquestioning adherence to an order improvidently granted.” “Improvidence in the granting of a protective order is [a] justification for lifting or modifying the order.” It would be improper and unfair to afford an order presumptive correctness if it is apparent that the court did not engage in the proper balancing to initially determine whether the order should have been granted.

Id. (alterations and omission in original) (internal citations omitted).

The court set out the following procedure for determining whether to modify a protective order:

The party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order, to determine whether good cause still exists for the order.

If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.

Pansy, 23 F.3d at 790 (alteration in original) (quoting Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1092 (1981), cited with approval in *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987)).

Finally, the *Pansy* court explained that an additional factor was relevant to the facts of that case:

[W]here [a governmental entity] is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of [government] records to the public under [state and federal freedom of information laws]. An order binding [governmental entities] shall be narrowly drawn to avoid interference with the rights of the public to obtain disclosure of [government] records and shall provide an explanation of the extent to which the order is intended to alter those rights.

Id. at 791 (second, third, fourth, fifth, and sixth alterations in original) (quotation marks omitted) (quoting Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 182 (1992)). The court held:

[W]here it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope

would prevent disclosure of that information pursuant to the relevant freedom of information law. In the good cause balancing test, this strong presumption tilts the scales heavily against entering or maintaining an order of confidentiality. To avoid complicated inquiries as to whether certain information would in fact be available under a freedom of information law, courts may choose to grant conditional orders.

Id. The court explained that “[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws.” *Id.* at 792.

- In *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005), the Third Circuit explained that after a court enters a protective order, “there must be good cause to maintain the order in the face of a motion to vacate it, particularly when, as here, the moving party did not have an opportunity to oppose the entry of the protective order in the first instance.”
- One district court in the Third Circuit, in considering a request for modification of a protective order to provide more protection than originally granted, explained that the Third Circuit requires good cause to modify a protective order, rather than the more stringent “extraordinary circumstances” or “compelling need” required by the Second and Sixth Circuits. *See Green, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C.*, No. Civ. A. 00-3058, 2002 WL 32349383, at *2 (E.D. Pa. Feb. 6, 2002). In addition to the factors considered for granting a protective order, the court considered “the interests of fairness and efficiency and the parties’ reliance on the protective order.” *See id.* at *4.
- Another district court discussed the various factors from *Pansy* in considering a request to modify a protective order. The court explained:

Two factors to consider are (i) whether the information sought is important to the public’s health and safety, and (ii) whether it involves any legitimate public concern. If the parties or issues are of a public nature, and are matters of legitimate public concern, that should be a factor weighing in favor of disclosure. On the other hand, “[w]here the parties are private, the right to rely on confidentiality in their dealings is more compelling than where a government agency is involved[.]”

Damiano v. Sony Music Entm’t, Inc., 168 F.R.D. 485, 491 (D.N.J. 1996) (alterations in original) (internal citations omitted). The court also considered whether the party benefitting from the confidentiality order was a public entity or official and whether sharing the information would promote fairness and efficiency among the litigants. *Id.* at 491–92. In addition, the court considered the purpose for which confidentiality was sought, and concluded that seeking to use “raw discovery materials for financial profit is not what this

court considers to be a legitimate purpose for disclosure.” *Id.* at 492. Finally, the court considered whether the parties had reasonably relied upon the protective order. *Id.* at 492–93.

- Another court explained that the standard used by the Seventh Circuit in *Wilk v. American Medical Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1980), is the appropriate standard for evaluating a request to modify a protective order:

[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order. (citations omitted).

Koprowski v. Wistar Inst. of Anatomy & Biology, No. Civ. A. 92-CV-1182, 1993 WL 332061, at *2 (E.D. Pa. Aug. 19, 1993) (alteration in original) (quotation marks omitted) (quoting *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 630 (S.D. Iowa 1993) (quoting *Wilk*, 635 F.2d at 1299)). The court concluded:

This standard is consistent with the purpose of the federal rules to “secure the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1. Courts have favored promotion of full disclosure through discovery to meet the needs of parties in pending litigation.

Accordingly, in applying the *Wilk* standard, a court must weigh potential prejudice, if any, against the benefits of modification of the confidentiality agreement.

Id. (internal citations omitted). The court also pointed out that “[t]he extent to which a party can rely on a protective order or confidentiality agreement should depend on the extent to which the order induced the party to allow discovery or to settle the case.” *Id.* The court found it relevant that the intervenors seeking modification had agreed to use the information in accordance with the protective order provisions, disposing of the threat of dissemination, and disposing of the argument that modification would undermine the plaintiffs’ reliance. *Id.* The court found that modification was appropriate, concluding that “[t]he potential benefits to intervenors from modification of the confidentiality agreement—against which must be weighed plaintiff’s potential prejudice—is the saving of time and expense which may be achieved by avoiding duplicative discovery.” *Id.* at *3 (citations omitted).

- In *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009), *petition for cert. filed*, 60 U.S.L.W. 3500

(U.S. Feb. 9, 2010) (No. 09-951), the Third Circuit addressed standing to seek modification of a protective order. The district court had granted a third party’s request to intervene, but denied that party’s request to modify the protective order, noting that ““what NRTW seeks has not been filed with the court in any motions or pleadings; instead, it consists of defendants’ production to the plaintiffs; such documents are raw discovery and are ordinarily inaccessible to the public through the common law right of access; thus, NRTW has no path of access to this information or a presumptive right to it.”” *Id.* at 745–46 (footnote omitted). The Third Circuit noted that “[t]he right of access to judicial proceedings and judicial records is beyond dispute,” *id.* at 746 n.5 (citing *Pansy*, 23 F.3d 772), but explained that “because the documents the NRTW seeks have never been filed with the district court, they are not judicial records, and, therefore, the NRTW cannot obtain access to them under the right of access doctrine,” *id.* The court noted that it had previously held—in the context of a gag order—that ““the consent of the parties to the order limiting speech is irrelevant to third-party standing analysis as long as the third party can demonstrate that an individual subject to the order would speak more freely if the order is lifted or modified. . . .”” *Id.* at 750 (omission in original) (quoting *United States v. Wecht*, 484 F.3d 194, 203 (3d Cir. 2007)). But the court rejected the intervenor’s argument that it had third party standing to seek modification of the protective order because the plaintiffs’ class counsel would provide the requested records absent the protective order, explaining that this argument “misinterprets the parameters of the willing speaker doctrine as well as the obstacles to disclosure of the Disputed Search Records.” *Id.* The court explained that the records sought were protected under the Driver’s Privacy Protection Act, and stated:

The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need.

Pichler, 585 F.3d at 752 (quotation marks omitted) (quoting Miller, *supra*, 105 HARV. L. REV. at 499).

FOURTH CIRCUIT

Standard for Entering a Protective Order

- A district court in the Fourth Circuit has explained:

Under Rule 26(c) of the Federal Rules of Civil Procedure, a court may enter a protective order upon motion of a party or persons from whom discovery is sought. In order to obtain a protective order, the party requesting the protective order must show good cause.

Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412 (M.D.N.C. 1991). The request for a protective order must be based on a specific demonstration of facts rather than speculative statements about the need for a protective order and generalized claims of harm. *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981). “This requirement furthers the goal that the court grant as narrow a protective order as is necessary under the facts.” *Brittain*, 136 F.R.D. at 412.

Vallejo v. Alan Vester Auto Group, Inc., No. 5:07-CV-343-BO, 2008 WL 4610233, at *2 (E.D.N.C. Oct. 16, 2008).

Standard for Entering a Sealing Order

- In determining whether to seal court documents, the Fourth Circuit has differentiated between a common law presumption in favor of access, which “attaches to all ‘judicial records and documents,’” and a First Amendment guarantee of access, which “has been extended only particular judicial records and documents.” *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (citations omitted). “The common law presumption of access may be overcome if competing interests outweigh the interest in access” *Id.* (citations omitted). “Where the First Amendment guarantees access, on the other hand, access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.” *Id.* The court explained that the procedure for weighing competing interests in entering an order to seal judicial documents was set forth in *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984):

Under *Knight*, a court must first give the public notice of a request to seal and a reasonable opportunity to challenge it. While individual notice is unwarranted, the court must notify persons present in the courtroom of the request, or docket it “reasonably in advance of deciding the issue.” The court must consider less drastic alternatives to sealing and, if it decides to seal documents, must “state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review.”

Stone, 855 F.2d at 181 (internal citations omitted).

Standard for Modifying a Protective Order

- A court within the Fourth Circuit has explained the factors to consider in evaluating a request for a protective order:

A number of factors may be employed to help guide a court in exercising its discretion as to whether to modify a protective order.

These factors include: the reason and purpose for a modification, whether a party has alternative means available to acquire the information, the type of protective order which is at issue, and the type of materials or documents which are sought.

SmithKline Beecham Corp. v. Suntho Pharm. Ltd., 210 F.R.D. 163, 166 (M.D.N.C. 2002). The court found that “[t]he party seeking to modify a protective order bears the burden of showing good cause for the modification.”³ *Id.* (citing *TheStreet.com*, 273 F.3d at 229; *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993)). The court also noted that some courts have applied a stringent standard to modification. *See id.* (“Some courts even require a showing of compelling need, improvidence in consenting to the order, or some extraordinary circumstance.” (citations omitted)). The court added that many courts have found sufficient need for modification where modification would avoid duplicative discovery, focusing on “the considerable efficiency and savings of time and effort in avoiding duplicative discovery.” *Id.* (citing *Beckman Indus.*, 966 F.2d 470; *United Nuclear*, 905 F.2d 1424; *Jochims*, 148 F.R.D. 624, *as modified*, 151 F.R.D. 338).

The court noted that even when a collateral litigant needs documents to avoid duplicative discovery, that litigant would need to show an inability to obtain the information by alternative means. *Id.* The court explained:

A court should be hesitant to modify protective orders for matters unrelated to the litigation in front of it because otherwise, in the long run, parties may begin to distrust protective orders. Discovery, in turn, will become more complicated and expensive and settlements will be more difficult. [*TheStreet.com*], 273 F.3d at 230. A natural feeling of unfairness arises when the rules are modified during the middle of the game, especially without very good cause. *Id.* Second, modifying protective orders for other litigation involves re-litigation over issues that have nothing to do with the lawsuit in front of the court. *Jochims*, 151 F.R.D. at 343. This burdens both the court and the parties. *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 334 (M.D.N.C. 1999) (modification for ulterior purpose); *Jochims*, 151 F.R.D. at 343 (allowing modification but setting cut-off date for continued litigation). Such modifications involve the court in a controversy with which it is not familiar and over which it lacks control. *United Nuclear*, 905 F.2d at 1428 (“district court must refrain from issuing discovery orders applicable only to collateral litigation.”). The court in which the matter is pending will be in a better position to make rulings and the third party will have greater

³ The court was considering a request by the plaintiffs to modify a stipulated, blanket protective order. It is unclear if the court would require the party seeking modification to show good cause for modification if modification of a stipulated order were requested by a party who had not agreed to a stipulated protective order.

control when it is directly involved in that controversy. For these reasons, alternative means of obtaining the information should be sought prior to attempting to modify a protective order entered in another case.

Id. at 166–67. The court described additional factors relevant to the analysis:

In addition to the good cause and alternative means factors, the type of protective order sought to be modified has a direct bearing on the decision to modify. If the protective order has been entered upon an actual finding that the information falls within Rule 26(c) protection, great care should be exercised before modifying a protective order for use outside of the litigation and the court’s control. A blanket protective order, on the other hand, often is nothing more than a FED. R. CIV. P. 29 stipulation between the parties to keep discovery confidential. A party’s claimed reliance on such orders to protect confidentiality is, consequently, less than if the party had to make an actual or particular showing of confidentiality in order to obtain the protective order. Therefore, when the modification involves a blanket protective order, the nature of the document which is sought assumes even greater importance.

The type of documents or information which will be revealed by the modification to the protective order directly bears on the decision to modify. To the extent that the documents are so-called “judicial documents,” any presumption in favor of maintaining confidentiality must now contend with a presumption in favor of public access. While the parameters for defining a judicial document may not be entirely set, there appears to be agreement that it does not arise from the mere filing of papers or documents, but only those used, submitted and relied upon by the court in making its decision. And, even as to judicial documents, the court must balance the confidentiality concerns of law enforcement, the private interests of innocent third parties, and the parties themselves.

SmithKline Beecham, 210 F.R.D. at 167 (internal citations and footnote omitted). The court added: “When the document or information does not fall under the judicial document category, the court may look to the reasonableness of a party’s reliance on maintaining confidentiality under a protective order.” *Id.* The court noted that “nothing else appearing, a court may presume that any production of documents or information under a protective order has been in reasonable reliance on that order,” but that “[f]acts, of course, may dispel this presumption.” *Id.* The court further explained:

For example, greater credence may be given to reliance on the

confidentiality of settlement protective orders as opposed to more temporary pretrial ones. On the other hand, when the documents at issue do not likely involve highly confidential information, and/or the reason opposing disclosure is mainly the desire to make litigation more difficult, opposition to modification carries less weight. And, the wholesale release of documents creates problems when doing so impinges on a wide variety of confidentiality, from trade secrets to less confidential business information. The burden of reviewing such a wholesale request constitutes grounds for denying the same.

Id. at 167–68 (internal citations omitted). The court concluded by noting that while avoiding duplicative discovery can be a proper ground for modifying a protective order, it “should, in most cases, be the last resort of a party, not the first.” *Id.* at 169.

- In a recent case, the Fourth Circuit affirmed the district court’s decision to place the burden of maintaining confidentiality on a third party seeking confidential treatment, when another party sought access to relevant information covered by a protective order. In *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 242 (4th Cir. 2009), a nonparty witness asserted a right to anonymity under the First Amendment in a deposition taken pursuant to a subpoena. The court that issued the subpoena, which was not the court presiding over the main action, noted that the third party had “no legal right to complete anonymity,” and entered a protective order prohibiting the lawyers from disclosing the identity of the nonparty witness to anyone else, including the parties. *Id.* at 242, 243 (emphasis omitted). The court specified that its order was subject to modification by a Maryland district court, where the action was pending. *Id.* at 242. The defendant then moved in the Maryland court for unsealing of the deposition, and the Maryland court modified the protective order to allow the third party deponent’s identity to be disclosed to the parties in the case, but maintained the portion of the protective order prohibiting disclosure to the public. *Id.* at 245. The district court concluded that the defendant had “made an adequate showing that this information [wa]s relevant to its opposition to class certification as well as to certain defenses it might raise to Plaintiff’s claims,” and explained that the deponent’s “desire to keep this information private simply does not rise to the level of good cause necessary to maintain it under seal from the parties to this litigation and doing so interferes with Jos. A. Bank’s counsel’s ability to represent its client.” *Id.* at 247. The Fourth Circuit affirmed the district court’s modification of the protective order, noting that the defendant had shown the information was relevant and that the First Amendment right to anonymity was subject to the substantial governmental interest expressed in Rule 26 in providing the defendant a fair opportunity to defend itself in court. *See id.* at 249 (citing FED. R. CIV. P. 26(b)(1)).
- Another case noted that a court must be careful to protect the parties’ reliance on a protective order, stating:

[U]nless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when

the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding. The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them.

State Auto Mutual Ins. Co. v. Davis, No. 2:06-cv-00630, 2007 WL 2670262, at *2 (S.D. W. Va. Sept. 7, 2007) (quoting *SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 529 (N.D. Ala. 2003) (quoting Miller, *supra*, 105 HARV. L. REV. at 499–501)).

- In another case, the court assumed that only good cause was required to modify a protective order, and explained that whether the burden of showing good cause rested with the party seeking modification or with the party seeking confidentiality depends on the showing made when the order was entered. See *Factory Mut. Ins. Co. v. Insteel Indus., Inc.*, 212 F.R.D. 301, 303 (M.D.N.C. 2002) (“The standard for modifying a protective order depends on whether the parties were required to demonstrate good cause for the issuance of the order, whether the parties relied on the order, and whether the parties stipulated to the terms of the order.” (quoting *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999))). The court stated: “If good cause were not required to be shown when the order was initially entered, the party who later seeks to prevent disclosure of the information bears the burden of showing good cause. If good cause were shown initially, however, the party seeking to modify the order must show good cause.” *Id.* (internal citation omitted). The *Factory Mutual Insurance* court found that because the parties and a nonparty had entered into a stipulated protective order, they had “‘implicitly acknowledged’ that there was good cause for protecting” the information at issue, and the court held that the party seeking to lift the protective order therefore bore the burden of showing good cause to modify the order. *Id.* at 304. The court also noted that “when the party seeking modification stipulated to the terms of the order, courts have treated the issue of showing good cause differently.” *Id.* at 304 n.2 (citations omitted); see also *Longman*, 186 F.R.D. at 334 (“It is not appropriate to allow a party to agree to a protective order, only to attempt to undo their agreement at the last possible moment.”); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) (“When, however, the proposed modification affects a protective order stipulated to by the parties, as opposed to one imposed by the court, it is clear that the shared and explicit assumption that discovery was for the purposes of one case alone goes a long way toward denying the movant’s request without more.”). The *Factory Mutual Insurance* court also noted that it was “even more apparent” that the party seeking modification was required to show good cause because “this issue is treated differently when modification is sought for purely investigative purposes in which no actual litigation is involved.” 212 F.R.D. at 305. The court explained that “[i]n such a case, modification of the protective order is less likely to be granted, in part because the absence of any pending litigation diminishes the likelihood that costly and time-consuming discovery will be avoided.” *Id.* (footnote and citation omitted). The court noted that the situation would be different if it were clear that modification of the protective order would avoid duplicative discovery in

another case, relying on the standard set out by the Seventh Circuit. *See id.* at 305 n.4 (“Modification of protective orders may be appropriate if repetition of discovery could be avoided without tangibly prejudicing the substantial rights of another party.” (citing *Wilk*, 635 F.2d at 1299)). The court found that good cause for modification was lacking and that “[r]epetition of discovery is simply unavoidable when a party . . . seeks to modify or to vacate a protective order solely to investigate possible collateral litigation.” *Id.* at 306.

FIFTH CIRCUIT

Standard for Entering a Protective Order

- The Fifth Circuit has explained:

Rule 26(c)’s requirement of a showing of good cause to support the issuance of a protective order indicates that “[t]he burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035, at 483–86 (2d ed. 1994).

In re Terra Int’l Inc., 134 F.3d 302, 306 (5th Cir. 1998) (per curiam).

- In another case, the Fifth Circuit noted that “[t]he grounds for a protective order can include privileged or work-product material, but can also include the improper sharing of confidential information between litigants in separate cases.” *Crosswhite v. Lexington Ins. Co.*, 321 F. App’x 365, 368 (5th Cir. 2009) (unpublished) (citing *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989)).
- A court within the Fifth Circuit has also stated:

“Good cause” exists when disclosure will result in a clearly defined and serious injury to the party seeking the protective order. *Pansy*, 23 F.3d at 786. The litigant seeking a protective order must articulate the injury with specificity. “Broad allegations of harm, unsubstantiated by specific examples,” do not support a showing of good cause. The burden of justifying a protective order remains on the litigant seeking the order. In determining good cause, the court must balance the risk of injury without the protective order and the requesting party’s need for information. The court has wide discretion in determining the scope of a protective order.

Blanchard & Co., Inc. v. Barrick Gold Corp., No. 02-3721, 2004 WL 737485, at *5 (E.D.

La. Apr. 5, 2004).

Standard for Entering a Sealing Order

- The Fifth Circuit has described the following standard for sealing court documents:

Courts have recognized that the public has a common law right to inspect and copy judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981). However, the public's common law right is not absolute. *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312; *see Belo*, 654 F.2d at 430. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312. Thus, the common law merely establishes a presumption of public access to judicial records. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). Although the common law right of access to judicial records is not absolute, "the district court's discretion to seal the record of judicial proceedings is to be exercised charily." *Federal Savings & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987).

In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure. *See Nixon*, 435 U.S. at 599, 602, 98 S. Ct. at 1312, 1314 (court must consider "relevant facts and circumstances of the particular case"); *Belo*, 654 F.2d at 434; *see also Bank of America Nat'l Trust v. Hotel Rittenhouse*, 800 F.2d 339, 344 (3d Cir. 1986) (court had duty to "balance the factors favoring secrecy against the common law presumption of access"); *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) ("The historic presumption of access to judicial records must be considered in the balance of competing interests." (citing *Belo*)).

SEC v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993) (footnote omitted). The *Van Waeyenberghe* court found that the district court had abused its discretion in sealing court documents because there was no evidence that the district court balanced the competing interests prior to entering the sealing order, noting that the district court had not mentioned the presumption in favor of public access to judicial records and had not articulated any reasons that would support sealing the documents at issue. *See id.* at 848–49.

The *Van Waeyenberghe* court distinguished between the public's right to information and the public's right to access judicial records:

Although the public may have a right to the *information* that Schwartz was enjoined, that right cannot be equated with the public's right of access to *judicial records*. The public's right to information does not protect the same interests that the right of access is designed to protect. "Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."

Id. at 849 (alteration in original) (citations omitted).

- The Fifth Circuit has also explained that the right of public access to judicial records applies even in cases where the information may not be of particular interest to the public. In *Macias v. Aaron Rents, Inc.*, 288 F. App'x 913, 915 (5th Cir. 2008) (unpublished), the Fifth Circuit found that the district court had not abused its discretion by refusing to seal court documents because the concerns the party requesting sealing raised—"the lack of importance to the public and the potential for employer retaliation against litigious employees—could apply to nearly all cases filed in the federal courts, especially those involving title VII." The court continued: "If we were to decide that the court's determination here was an abuse of discretion, then the same argument could successfully be made by countless plaintiffs. Such a result, however, would be contrary to our statement that 'the district court's discretion to seal the record of judicial proceedings is to be exercised *charily*.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848 (internal citations and quotations omitted) (emphasis added)).
- A district court within the Fifth Circuit has explained the standard for sealing as follows:

To determine whether to disclose or seal a judicial record, the Court must balance the public's common law right of access against interests favoring non-disclosure. *See S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993). "Courts have recognized that the public has a common law right to access judicial records and proceedings, although the right is not absolute." *Bahwell v. Stanley-Bostitch, Inc.*, No. Civ.A. 00-0541, 2002 WL 1298777, at *1 (E.D. La. June 10, 2002). "Public access serves important interests, such as 'to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 849). "Accordingly, 'the district court's discretion to seal the record of judicial proceedings is to be exercised *charily*.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848). Although countervailing interests may outweigh the right of public access, the party seeking to overcome the presumption of access bears the burden of showing that

the interest in secrecy outweighs the presumption. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993). The decision as to access is left to the discretion of the trial court, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978), but any doubt must be construed in favor of disclosure. *Marcus v. St. Tammany Parish Sch. Bd.*, No. Civ.A. 95-3140, 1997 WL 313418, at *5 (E.D. La. June 9, 1997) (citing *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). Finally, that no third party objects to the sealing of the records here is “inconsequential,” because the presumption of openness does not depend on such an objection. *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003); see also *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it) . . . [.] [She] may not rubber stamp a stipulation to seal the record.”) (internal citations omitted).

Jaufre ex rel. Jaufre v. Taylor, 351 F. Supp. 2d 514, 516 (E.D. La. 2005) (second alteration in original). In discussing possible interests that might outweigh the right to public access, the court stated that “[c]ourts have recognized that the privacy of children may constitute a compelling interest that outweighs the presumption in favor of public access.” *Id.* (citations omitted). The court also noted that “[c]ourts have also recognized, however, that the public’s interest in access to court records ‘is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official.’” *Id.* at 517 (citations omitted). The court emphasized that “[w]hen courts find that a privacy interest justifies restricting the public’s access, they restrict access in a way that will minimize the burden on the public’s right, such as by sealing or redacting only those records that contain sensitive information,” *id.* at 517–18 (citations omitted), and that “[a] blanket sealing order . . . would rarely, if ever, be appropriate,” *id.* at 518 (additional citation omitted) (quoting *T.K. & R.K. v. Waterbury Bd. of Ed.*, No. Civ. 303CV1747, 2003 WL 2290433, at *1 (D. Conn. Oct. 19, 2003)). The court also recognized that where the public has already had access to documents, that is a factor weighing “in favor of continued public access.” *Id.* (citation omitted); see also *Weiss v. Allstate Ins. Co.*, No. 06-3774, 2007 WL 2377119, at *5 (E.D. La. Aug. 16, 2007) (“[T]his Court has consistently refused to seal judicial records to which the public has already had access.” (citations omitted)).

Standard for Modifying a Protective Order

- The Fifth Circuit has recognized that modification of a protective order to avoid duplicative discovery in collateral litigation should generally be permitted, but has emphasized that requests for modification should not be used simply to obtain documents that were not produced in discovery in another case because the more efficient course would be to seek

to compel the discovery in the collateral case. *See Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986) (“Discovery has already taken place in [the collateral litigation] and the [collateral] plaintiffs seek only to obtain documents which Tenneco allegedly failed to produce in that case. As the district court noted, requiring the [collateral] plaintiffs to move to compel discovery in their own case would not cause undue wastefulness; indeed, such a motion would be the most efficient way to obtain the desired discovery.”).

- In a recent district court case, the court considered a party’s request to modify a stipulated protective order to allow discovery for collateral litigation, and recognized several factors a court should consider in deciding whether to grant a request for modification:

Parties may seek modification of a protective order to gain access to previously deemed confidential materials. The Fifth Circuit has “recognize[d] that protective order[s] should generally be modified to allow discovery in other actions” *Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986). . . .

. . . .

. . . The following factors should be considered in deciding whether to modify a protective order: “(1) the nature of the protective order, (2) the foreseeability, at the time of issuance of the order, of the modification requested, (3) the parties’ reliance on the order[,] and most significantly[,] (4) whether good cause exists for the modification.”

Schafer v. State Farm & Fire Cas. Co., No. 06-8262, 2009 WL 650263, at *2 (E.D. La. Mar. 11, 2009) (first alteration and first omission in original) (citations omitted); *accord Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-cv-109, 2008 WL 4371679, at *2 (E.D. Tex. Sept. 18, 2008) (listing same four factors for consideration in deciding whether to modify a protective order at the request of a party who originally agreed to the order); *Peoples v. Aldine Indep. Sch. Dist.*, No. 06-2818, 2008 WL 2571900, at *2 (S.D. Tex. June 19, 2008) (same); *Holland v. Summit Tech., Inc.*, No. Civ. A. 00-2313, 2001 WL 1132030, at *2 (E.D. La. Sept. 21, 2001) (same).

- In considering the same four factors listed in *Schafer*, another court elaborated:

First, the court considers the nature of the protective order. Protective orders generally may be ascribed one of three labels. Specific protective orders are the narrowest type and cover specifically identified information. Umbrella protective orders are at the other end of the spectrum and provide for the designation of all discovery as protected without any screening by either the parties or the court. Blanket protective orders, which require the parties to

designate as protected that information that each side reasonably believes to be particularly sensitive are common in litigation between direct competitors. Specific protective orders are the least susceptible to modification, umbrella protective orders are the most susceptible to modification, and blanket protective orders fall somewhere in between.

Raytheon, 2008 WL 4371679, at *2 (internal citations omitted). The court noted that although “blanket orders are moderately susceptible to modification,” the fact that the parties had stipulated to the protective order weighed against modification. *Id.* The court continued:

Foreseeability in this context consists of inquiry into “whether the need for modification was foreseeable at the time the parties negotiated the original stipulated protective order.”

. . . .

The reliance factor focuses on the extent to which the party opposing the modification relied on the protective order in deciding the manner in which documents would be produced in discovery. It is important that litigants can place their confidence in the integrity of protective orders so that sufficient information passes between the parties “to secure the just, speedy, and inexpensive determination,” FED. R. CIV. P. 1, of lawsuits while protecting from excess dissemination that which rightly should be.

Id. at *2–3 (internal citations omitted). The court explained that if the protective order is initially entered on a showing of good cause, the party seeking modification has the burden to establish good cause for modification. *See id.* at *3. The good cause inquiry involves balancing the need of the party requesting modification with the opposing party’s need for protection, and requires taking into account available alternatives to modification. *Id.* Another court explained that “[g]ood cause’ in this context requires ‘changed circumstances or new situations’ warranting modification of a protective order,” and that “[g]ood cause includes the need to make information available for use in subsequent proceedings.” *Peoples*, 2008 WL 2571900, at *3.

- In the context of a nonparty seeking to obtain documents subject to a protective order, another district court has explained that the Fifth Circuit has rejected the strict standard applied in the Second Circuit for modifying protective orders to provide access to discovery for collateral litigation. *See In re United States’ Motion to Modify Sealing Orders*, No. 5:03-MC-2, 2004 WL 5584146, at *3 (E.D. Tex. June 8, 2004) (explaining that the “extraordinary circumstances” test for modification used by the Second Circuit in *Martindell* “has not prevailed in the arena of ideas,” and stating that “[w]hatever the status of the Second Circuit

view, the prevailing approach is more flexible, calling for a balancing test that accords substantial importance to avoiding repetitive discovery.” (quoting 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2044.1 (2d ed. 1994)). The court found that determining which party or nonparty bears the burden of showing good cause depends on the public interest in the case: “The criterion for modification of a protective order by a nonparty seeking to obtain access to information of public interest is a ‘good cause’ standard. When the case is of great interest to the public and media, the courts refuse to shift the burden to the party seeking to modify the protective order. Instead, the party seeking to maintain confidentiality must show good cause for continued protection.” *Id.* at *2.

The court explained the more flexible approach adopted by the Fifth Circuit, *see id.* at *3 (“[T]he Fifth Circuit embraces a flexible approach towards the modification of protective orders.”), and noted that the Fifth Circuit has relied on the approach stated in *Wilk v. American Medical Ass’n*, 635 F.2d 1295 (7th Cir. 1980). The court stated:

[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.

Motion to Modify Sealing Orders, 2004 WL 5584146, at *4 (quotation marks omitted) (quoting *Wilk*, 635 F.2d at 1299 (certain citations omitted)); *accord Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643, at *2 (N.D. Tex. Feb. 1, 2002). Another court elaborated that “[t]he clear majority of courts utilizing the test for modification of protective orders set out in *Wilk* have allowed liberal modification. However, in most instances where modification is allowed there has been no discovery in the collateral action and the court is thus reluctant to require wasteful and needlessly repetitive discovery.” *Forest Oil Corp v. Tenneco*, 109 F.R.D. 321, 322 n.2 (S.D. Miss. 1985) (citing *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D. Tex. 1985)), *appeal dismissed for lack of jurisdiction*, *Stack v. Gamill*, 796 F.2d 65 (5th Cir. 1986).

- Another court has explained that in cases involving a large amount of discovery, courts can enter umbrella protective orders and delay findings of good cause as to particular documents until confidentiality designations are challenged: “[B]ecause of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad umbrella protective order upon a threshold showing by the movant of good cause. After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.”

Holland v. Summit Tech., Inc., No. Civ. A. 00-2313, 2001 WL 1132030, at *2 (E.D. La. Sept. 21, 2001) (quoting *Pansy*, 23 F.3d at 787 n.17).

- Another court noted that “[i]t is well established that nonparties to a case seeking access to documents and records under a protective order or under seal in a civil case may do so by a motion for permissive intervention under Rule 24(b)(2).” See *Newby v. Enron Corp. (In re Enron Corp. Sec. Derivative & “ERISA” Litig.)*, 229 F.R.D. 126, 130 (S.D. Tex. 2005) (footnote and citations omitted). The court also noted that an intervening party must have standing. See *id.* The court explained that “[n]ormally the would-be intervenor must demonstrate that it has (1) an independent ground for subject matter jurisdiction, (2) a timely motion, and (3) a claim or defense that has a question of law or fact in common with the main action,” but explained that “[s]ome courts have carved out a narrow exception to the first prong where the party seeks intervention for the limited purpose of obtaining access to documents protected by a confidentiality order because the would-be intervenor is merely asking the court to exercise a power it already has, i.e., to modify the confidentiality order, and not to rule on the merits of a claim or defense.” *Id.* (citing *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1046, 1047 (D.C. Cir. 1998)).

SIXTH CIRCUIT

Standard for Entering a Protective Order

- The Sixth Circuit has emphasized that public access to pretrial discovery documents is limited:

The Supreme Court has directly addressed the constitutionality of orders limiting access to the fruits of discovery in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). . . . The Supreme Court observed that “an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny,” 467 U.S. at 33, 104 S. Ct. at 2208, because “such a protective order prevents a party from disseminating only that information obtained through use of the discovery process.” *Id.* at 34, 104 S. Ct. [at] 2208. Pretrial discovery, the Court stated, is traditionally subject to the control and discretion of the trial judge, and ordinarily proceeds as a private interchange between the parties, the fruits of which are not presumptively public. Accordingly, any judicial review of protective orders entered in the discovery context must take into account “the unique position that such orders occupy in relation to the First Amendment.” *Id.* Concluding that “[t]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders,” *id.* at 36, 104 S. Ct. at 2209, the *Seattle Times* Court held:

[W]here, as in this case, a protective order is entered on a showing of good cause, . . . is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

In re Courier-Journal v. Marshall, 828 F.2d 361, 364 (6th Cir. 1987) (second and third alterations and second omission in original) (quoting *Seattle Times*, 467 U.S. at 37); *see also R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 269 (6th Cir. 2010) (“The district court did not abuse its discretion in denying Olmstead employees access to the CUI end use product (the CUI software interface) because the district court’s decision to grant Olmstead’s experts access to the software properly balanced the need for Olmstead to have access to relevant and necessary information with CUI’s interest in preventing a potential competitor from having access to its software.”).

The *Courier-Journal* court rejected a news organization’s “claim of a first amendment right of access to the fruits of discovery” as “unavailing.” *Courier-Journal*, 828 F.2d at 366. The court approved of the protective orders at issue because they were “‘limited to the context of pretrial civil discovery,’ and they did not ‘restrict the dissemination of the information if gained from other sources,’” *id.* at 367 (quoting *Seattle Times*, 467 U.S. at 37), and because the orders were entered on a showing of “good cause,” “after fairly balancing the very limited right of access the press has to the presumptively nonpublic fruits of civil discovery against the right of civil rights plaintiffs to obtain discovery . . . over a claimed privilege based on first amendment associational rights.” *Id.*

- The Sixth Circuit has also stated the standard as follows:

Rule 26 of the Federal Rules of Civil Procedure permits courts to issue a protective order, if justice requires and to protect individuals from “annoyance, embarrassment, oppression, or undue burden or expense” FED. R. CIV. P. 26(c). The burden of establishing good cause for a protective order rests with the movant. *See General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). “To show good cause, a movant for a protective order must articulate specific facts showing ‘clearly defined and serious injury’ resulting from the discovery sought and cannot rely on mere conclusory statements.” *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987) (citations omitted).

Nix v. Sword, 11 F. App’x 498, 500 (6th Cir. 2001) (unpublished) (per curiam).

Standard for Entering a Sealing Order

- The Sixth Circuit has explained that while a court may have some discretion to seal court documents, that discretion is limited by “long-established legal tradition.” *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983). The court explained that “[t]he English common law, the American constitutional system, and the concept of the ‘consent of the governed’ stress the ‘public’ nature of legal principles and decisions.” *Id.* (footnote omitted). The court analyzed the Supreme Court’s decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which discussed the history behind the right of access to legal proceedings. *See Brown & Williamson*, 710 F.2d at 1178. The *Brown & Williamson* court described the policies emphasized by the Supreme Court in *Richmond Newspapers*:

The Supreme Court’s historical argument is based on policy considerations developed in the past that remain valid today. First, public trials play an important role as outlets for “community concern, hostility, and emotions.” *Richmond Newspapers, supra*, 448 U.S. at 571, 100 S. Ct. at 2824. When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes. “The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’” *Id.* at 571, 100 S. Ct. at 2824.

Second, public access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. In his concurrence, Justice Brennan emphasized this link between access to the courtroom and the popular control necessary in our representative form of government. *Id.* at 592, 100 S. Ct. at 2835. Although the federal judiciary is not a majoritarian institution, public access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.

Finally, Justice Brennan points out that open trials promote “true and accurate fact finding.” *Id.* at 596, 100 S. Ct. at 2838. When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence. Witnesses in an open trial may be less inclined to perjure themselves.

Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial.

Id. (alteration in original) (some internal citations omitted). *Brown & Williamson* concluded that “[t]he Supreme Court’s analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.” *Id.*

However, the court noted that “[t]he right of access is not absolute . . . , despite these justifications for the open courtroom.” *Id.* at 1179. The court explained that courts have made several exceptions to the strong presumption of access, which it stated fall into the categories of “those based on the need to keep order and dignity in the courtroom and those which center on the content of the information to be disclosed to the public.” *Id.* With respect to the first category, the court stated that regulations on access “must pass the following three-part test: that the regulation serve an important governmental interest; that this interest be unrelated to the content of the information to be disclosed in the proceeding; and that there be no less restrictive way to meet that goal.” *Brown & Williamson*, 710 F.2d at 1179 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). With respect to the second category, the court found that “content-based exceptions to the right of access have been developed to protect competing interests,” and that “[i]n addition to the defendant’s right to a fair trial, these interests include certain privacy rights of participants or third parties, trade secrets and national security.” *Id.* (citations omitted). The court concluded that harm to a company’s reputation is not sufficient to warrant sealing. *Id.*

The court held that sealing was not appropriate and focused on the fact that the subject of the litigation—the accuracy of testing the “tar” and nicotine content of cigarettes—was one in which the public had a strong interest and that potentially involved the public’s health. *See id.* at 1180–81.

- In another case, the Sixth Circuit noted the long history of the presumption of public access to the courts, but explained that there are several “important exceptions which limit the public’s right of access to judicial records.” *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983). The court explained:

[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not “used to gratify private spite or promote public scandal” through the publication of “the painful and sometimes disgusting details of a divorce case.” Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant’s competitive standing.

Id. (alteration in original) (quotation marks omitted) (quoting *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978) (citations omitted)). The court stated that “trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public’s right to know,” and that “the decision as to when judicial records should be sealed is left to the sound discretion of the district court, subject to appellate review for abuse.” *Id.* (citations omitted). The Sixth Circuit emphasized that the district court should have afforded the press a reasonable opportunity to object to the protective order sealing the court record, *id.* at 474–75, and explained that “the district court had an obligation to consider the rights of the public and the press,” *id.* at 475. The court formulated a procedure for ensuring the press and the public’s right to object to sealing:

In order to protect this right to be heard, the most reasonable approach would be to require that motions to seal be docketed with the clerk of the district court. The records maintained by the clerk are public records. If a party moves to seal a document, or the entire court record, such a motion should be made “sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court.” The district court should then allow interested members of the public a reasonable opportunity to present their claims, without causing unnecessary or material delay in the underlying proceeding.

Id. at 475–76 (alteration in original) (internal citations omitted). The court explained that “[o]nly the most compelling reasons can justify non-disclosure of judicial records.” *Knoxville News*, 723 F.2d at 476 (citing *Brown & Williamson*, 710 F.2d at 1179–80; *United States v. Myers (In re Nat’l Broadcasting Co.)*, 635 F.2d 945, 952 (2d Cir. 1980)).

- A district court in the Sixth Circuit recently emphasized that compelling reasons are necessary to seal court documents. *See Pucci v. 19th Dist. Court*, No. 07-10631, 2009 WL 596196, at *9 (E.D. Mich. Mar. 6, 2009). The court recognized the long history of the presumption of public access to judicial records, and stated that “[i]n exercising its discretion to seal judicial records, the Court must balance the public’s common law right of access against the interests favoring nondisclosure.” *Id.* at *8 (citations omitted). The court explained that “[o]nly the most compelling reasons can justify non-disclosure of judicial records,” *id.* at *9 (quoting *Knoxville News*, 723 F.2d at 476), and that “[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records,” *id.* (quoting *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).
- In the context of considering a request to seal a doctor’s report evaluating the competency of a habeas petitioner, another case discussed the competing interests weighed in connection with a request to seal judicial documents. The court explained:

Historically, there has been a presumption of openness and public access to judicial proceedings and documents. *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986); *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 507, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). Addressing the presumption of access to judicial proceedings, in *Press-Enterprise II*, the Supreme Court held that there is a qualified right of public access to judicial proceedings, rooted in the First Amendment, if there is “a tradition of accessibility” to the nature of the proceedings involved and if public access “plays a significant positive role in the functioning of the particular process in question.” *Press-Enterprise II*, 478 U.S. at 8–9, 106 S. Ct. 2735.

Beyond the First Amendment analysis, there exists a common law right of access to judicial proceedings and documents that does not rise to a constitutional dimension and is left to the sound discretion of the trial court. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). Distinguishing between access to judicial proceedings and access to judicial documents, the Sixth Circuit has addressed whether there is a First Amendment right to inspect and copy judicial documents, or only a common law right of access. *Compare United States v. Beckham*, 789 F.2d 401, 406–409, 412–15 (6th Cir. 1986) (holding that media members had no constitutional right of access to tapes), *with Application of National Broadcasting Company, Inc.*, 828 F.2d 340, 345 (6th Cir. 1987) (holding that there is a qualified First Amendment right of access to proceedings and documents relating to disqualification of a judge in a criminal case and to conflicts of interest between attorneys in a criminal case).

With respect to the common law right of access, a trial court’s discretion is not unfettered and typically involves a fact-intensive and context-specific balancing of the competing interests of those who seek access and those who seek to deny it. The interests to be weighed include (1) the Court’s supervisory powers over its own documents; (2) the benefit to the public from the incremental gain in knowledge that would result from access to the materials in question; (3) the degree of danger to the petitioner or other persons mentioned in the materials; (4) the possibility of improper motives on the part of the media; and (5) any special circumstances in the case. That said, there is a strong presumption in favor of access, and any balancing of

interests begins with that presumption in favor of access. In light of the presumption in favor of access, merely articulating rational justifications for denying access will not suffice; rather, a district court must set forth “substantial reasons” for denying access.

Ashworth v. Bagley, 351 F. Supp. 2d 786, 788–89 (S.D. Ohio 2005) (some internal citations omitted).⁴

- Another district court case emphasized the difference in proof required to obtain a discovery protective order and an order to seal documents. See *White v. GC Servs. Ltd. P’ship*, No. 08-11532, 2009 WL 174503, at *1 (E.D. Mich. Jan. 23, 2009) (recognizing “the differing standards of proof that apply to Rule 26(c) discovery-phase orders vis-a-vis orders to seal documents that are submitted to the court for filing”). The court explained that a party must show “good cause” to obtain a protective order governing discovery material, but that “[o]nce documents are filed with the court, there is a strong presumption, grounded in both the First Amendment and the common law, that they should be open to the public.” *Id.* (citations omitted). The court stated that “[w]hile protective orders and sealing orders for court documents are permissible under the First Amendment, the ‘good cause’ standard of Rule 26(c) does not suffice. Rather, the party seeking to seal documents must show ‘compelling reasons.’” *Id.* (internal citation omitted).

Standard for Modifying a Protective Order

- The Sixth Circuit appears to leave the determination of whether to modify a protective order to the discretion of the district court, rather than mandate a particular standard to be used in every case. See *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (noting that when a collateral litigant requests modification of a protective order to access protected discovery, the circuits have adopted various approaches to balancing the interests at stake, and that some, including the Sixth Circuit, “have simply left the balancing to the discretion of the trial court” (citing *Stavro v. Upjohn Co. (In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.)*, 664 F.2d 114, 120 (6th Cir. 1981))).
- In one case, the Sixth Circuit has favorably cited the relatively less stringent standard used in *Wilk*:

We therefore agree with the results reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where

⁴ The court noted that “[b]ecause the Court is persuaded that a common law right of access exists with respect to the competency evaluation reports that have and will be submitted in this case, the Court need not reach the question of whether, or to what extent, there also exists a First Amendment right of access.” *Ashworth*, 351 F. Supp. 2d at 789.

it would tangibly prejudice substantial rights of the party opposing modification.

Upjohn, 664 F.2d at 118 (quoting *Wilk*, 635 F.2d at 1299) (quotation marks omitted).

- Another Sixth Circuit case also recognized discretion to modify protective orders, but focused on the parties' reliance on a protective order and discussed the need for the party requesting continued sealing of documents subject to a protective order to show compelling reasons. See *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161, 164 (6th Cir. 1987). The court described the applicable standard for considering a request for modification of a protective order:

Given that proceedings should normally take place in public, imposing a good cause requirement on the party seeking modification of a protective order is unwarranted. If access to protected fruits can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.

Nonparty Access to Discovery Materials in Federal Courts, 94 HARV. L. REV. 1085, 1092 (1981). (footnotes omitted).

Id. at 163 (quotation marks omitted) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 570 (E.D.N.Y. 1985))⁵; accord *Haworth, Inc. v. Steelcase, Inc.*, No. 4:85:CV:526, 1993 WL 195116, at *1 (W.D. Mich. 1993), *aff'd*, 12 F.3d 1090 (Fed. Cir. 1993); *Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc.*, 139 F.R.D 102, 104 (E.D. Mich. 1991). The *Meyer Goldberg* court found that "[p]rotective orders may be subject to modification 'to meet the reasonable requirements of parties in other litigation,'" 823 F.2d at 164 (quoting *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979); citing *Wilk*, 635

⁵ The district court's decision in *Agent Orange* was affirmed by the Second Circuit, see *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987), but portions of the Second Circuit's *Agent Orange* opinion discussing a presumption of public access to discovery materials have subsequently been questioned in light of an amendment to Federal Rule of Civil Procedure 5 that instructed parties not to file discovery materials with the court in most instances. See, e.g., *TheStreet.com*, 273 F.3d at 233 n.11 ("[T]o the extent that *Agent Orange* relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, we observe that the recent amendment to this rule provides no presumption of filing all discovery materials, let alone public access to them. Indeed, the rule now prohibits the filing of certain discovery materials unless they are used in the proceeding or the court orders filing." (citing FED. R. CIV. P. 5(d))).

F.2d at 1299), but remanded and implied that “compelling reasons” had to be present to allow denial of access to discovery material filed with the court, *see id.* (“We direct a remand, because the record does not reflect the district court’s consideration of the strong underlying tradition of open records, and that only compelling reasons justify denial or continued denial of access to records of the type sought . . .”).

- One district court found *Upjohn* to be distinguishable, and applied the more stringent standard from *Meyer Goldberg*. *See In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 130 F.R.D. 634, 640 (E.D. Mich. 1989). The court explained that “[i]n considering motions to modify protective orders, courts are split as to whether the burden of showing good cause for continued protection lies with the protected party or with the party seeking modification.” *Id.* at 638 (alteration in original) (citation omitted). But the court cited the language in *Meyer Goldberg* regarding the standard in the Sixth Circuit. *Id.* The court recognized that *Upjohn* puts less of a burden on the party requesting modification of a protective order, but found the *Upjohn* analysis inapplicable, stating:

The *Upjohn* Court instructs that the party, who opposes a modification of a protective order, must assume the burden of proof when a party in a pending case seeks to use discovery information that had been obtained pursuant to a protective order in a parallel case. In contrast, the Sixth Circuit Court of Appeals stated in a case, which was factually distinct from *Upjohn*, that when “legitimate secrecy interests” are involved, the party requesting a modification . . . must “show why [its] needs for the materials outweighs existing privacy concerns.” *Fisher Foods*, 823 F.2d at 163. Therefore, this Court concludes that neither the reasoning, the holding, nor the requisite burden of proof in *Upjohn* supports [the] instant request [for modification].

Id. at 640 (first alteration in original).⁶

- In another case, the court relied on the standard discussed in *Meyer Goldberg*, and found that a sealed transcript should remain sealed in the face of a request to modify a protective order because there was no pending related litigation and the deponent objected to releasing the seal. *See In re Bell & Beckwith*, 198 B.R. 265, 269 (Bankr. N.D. Ohio 1996). The court quoted the Second Circuit opinion in *Martindell*, which emphasized the importance of the parties’ reliance on protective orders and which stated that “absent a showing of

⁶ The court explained that the *Upjohn* court had focused on the following issues in deciding to lift the protective order: “(1) whether diversity of citizenship should serve as the basis for determining which plaintiffs may share in discovery material, (2) the ‘similar interests and motives’ of the entities requesting to share the information, and (3) a desire to allow the plaintiffs to develop their cases more fully.” *In re Air Crash Disaster*, 130 F.R.D. at 639–40. The court found that those considerations were not applicable to the request to modify in its own case because in its own case, a party sought modification to allow it to provide discovery to the National Transportation Safety Board, which was not a party to a pending lawsuit. *Id.* at 640.

improvidence in the grant of a Rule 26(c) protective order or some other extraordinary circumstance or compelling need, . . . a witness should be entitled to rely upon the enforceability of a protective order against third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation" *Id.* at 167–68. The *Bell & Beckwith* court noted that in *Meyer Goldberg*, the Sixth Circuit had cited *Martindell* as well as the standard in *Agent Orange*. *Id.* at 168. The court held that unsealing was not warranted because "there is no related litigation or even anyone who specifically requests these documents for particular purposes,"⁷ and because the deponent had relied on the protective order and opposed unsealing. *Id.* at 269.

- A district court in the Sixth Circuit has explained that in determining where to place the burden of showing good cause upon a request for modification of a protective order, it is relevant whether good cause was shown when the order was entered: "If a protective order was initially issued based upon good cause shown, the party seeking to modify the order has the burden of proof. However, if good cause was not shown when the protective order was issued, the party seeking to maintain the order has the burden of proof." *Playa Marel, P.M., S.A. v. LKS Acquisitions, Inc.*, No. C-3-06-366, 2007 WL 756697, at *3 (S.D. Ohio Mar. 8, 2007) (internal citation omitted). The court recognized four factors to be considered in determining whether a protective order should be modified:

Several factors may be used to assist a court in exercising its discretion as to whether to modify a protective order. They include (1) whether good cause exists for the modification, (2) the nature of the protective order, (3) the foreseeability of the modification requested at the time of issuance of the order, and (4) the parties' reliance on the order.

Id. at *4 (citations omitted).

SEVENTH CIRCUIT

Standard for Entering a Protective Order

- The Seventh Circuit has emphasized the court's duty to examine proposed protective orders to prevent the parties from having complete control over the degree of public access. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999). In *Citizens First National Bank*, the Seventh Circuit noted that the judge is required

⁷ The bankruptcy trustee had requested that all documents be released from seal "to further the bankruptcy policy of open disclosure" *Bell & Beckwith*, 198 B.R. at 266.

to make a determination of good cause to seal any part of the record of a case,⁸ and explained that “[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding.” *Id.* The court recognized that “pretrial discovery, unlike the trial itself, is usually conducted in private,” but noted that “the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.” *Id.* at 944–45. The court explained that the public’s interest “does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case.” *Id.* at 945 (citations omitted). The court emphasized:

The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record.

Id. (internal citation omitted).

The *Citizens First National Bank* court recognized that some courts may find that blanket protective orders entered by stipulation, without judicial review, that allow litigants to seal all documents produced in discovery, are useful aids to expediting the discovery process and not problematic because there is no tradition of public access to discovery materials, but pointed out that the weight of authority is to the contrary. *Id.* at 945–46. The court stated that “[m]ost cases endorse a presumption of public access to discovery materials, and therefore require the district court to make a determination of good cause before he may enter the order.”⁹ *Citizens First Nat’l Bank*, 178 F.3d at 946 (internal citations omitted).

⁸ The protective order at issue in *Citizens First National Bank* had been issued by the district judge in accordance with a stipulation by the parties, and “authoriz[ed] either party to designate as confidential, and thus keep out of the public record of the litigation, any document ‘believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity.’” 178 F.3d at 944. On appeal, one of the parties sought permission to file an appendix under seal, based on the district court’s protective order. *See id.* The Seventh Circuit expressed concern because the protective order was not limited to the pretrial stage and because the public has an interest in what occurs at all stages of a judicial proceeding. *Id.* at 945.

⁹ The *Citizens First National Bank* decision was issued before the 2000 amendment to Federal Rule of Civil Procedure 5, which removed the requirement of filing discovery materials with the court. To the extent the court’s decision was based on Rule 5’s previous requirement of filing discovery materials, its discussion of public access to discovery materials may have less relevance to current protective order standards. *See Bond v. Utreras*, 585 F.3d 1061, 1075–76 (7th Cir. 2009) (noting that cases suggesting that Rule 26(c) creates a substantive right of public access to discovery were based on the prior version of Rule 5(d) that required all discovery materials to be filed with the court, and explaining that “[w]hatever force these decisions had was destroyed by the 2000 amendment to Rule 5(d), which reversed the longstanding rule generally requiring discovery to be filed with the court”); *see also In re Thow*, 392 B.R. 860, 868

The court stated that “Rule 26(c) would appear to require no less,” and noted that “both the First and Third Circuits, which used to endorse broad umbrella orders (*e.g.*, *Cryovac*, *Cipollone*), have moved away from that position (*Public Citizen*, *Glenmede*, *Pansy*, *Leucadia*).” *Id.*

The court emphasized that good cause must be found, but need not be determined for each individual document, stating:

We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge. There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents.

Id.

- Another case also emphasized that courts have an independent duty to find good cause before entering a protective order, even if the parties stipulate to the terms. The court stated:

Stipulated protective orders place the district court in an unusual position. Normally, the court is quick to ratify (and rightly so) any areas of agreement between opposing parties. However, under Fed. R. Civ. Pro. 26(c), the district court has the power to issue a protective order only upon a showing of “good cause.” Even if the parties agree that a protective order should be entered, they still have “the burden of showing that good cause exists for issuance of that

(Bankr. W.D. Wash. 2007) (questioning the “continued viability” of a statement in a Ninth Circuit case that “the fruits of pretrial discovery are ‘presumptively public,’” and noting that “when *Agent Orange* and *Public Citizen* were decided, FRCP 5(d) required the filing of discovery materials with the court (subject to local rule or court order to the contrary”). Another court explained that while “in *Citizens First National Bank*, 178 F.3d at 946, the Seventh Circuit summarized that ‘[m]ost cases endorse a presumption of access to discovery materials,’ . . . it does not follow . . . that courts can therefore order parties to make available all discovery items exchanged amongst themselves.” *In re Bridgestone/Firestone, Inc.*, 198 F.R.D. 654, 657 (S.D. Ind. 2001). The court continued: “In . . . *Citizens First National Bank* . . . , the court[] discussed access to discovery materials in the context of items that *had been filed with the court*. Access to discovery materials when those materials have been presented to the court is one issue and quite another issue [is presented] when the parties are exchanging the materials amongst themselves.” *Id.* The court explained that “[a]bsent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit,” and that “if they do not see fit to disseminate discovery information, the parties need not do so.” *Id.* (quotation marks and citations omitted).

order. It is equally apparent that the obverse is also true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection”

Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) (quoting *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988)); accord *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 795 (7th Cir. 2009) (“It is of course true, as *Jepson* holds, that a district court is required to ‘independently determine if ‘good cause’ exists’ before judicially protecting discoverable documents from third-party disclosure.” (quoting *Jepson*, 30 F.3d at 858; citing FED. R. CIV. P. 26(c))).

Standard for Entering a Sealing Order

- Another Seventh Circuit court has explained:

Secrecy is fine at the discovery stage, before the material enters the judicial record. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). But those documents, usually a small subset of all discovery, that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality. *See, e.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). Information transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case’s outcome. Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in [the appellate] court.

Baxter Int’l Inc. v. Abbott Labs., 297 F.3d 544, 545–46 (7th Cir. 2002); *see also Containment Techs. Group, Inc. v. Am. Society of Health Sys. Pharmacists*, No. 1:07-cv-997-DFH-TAB, 2008 WL 4545310, at *4 (S.D. Ind. Oct. 10, 2008) (“[M]ost documents designated as confidential will never be filed with the Court or used in any Court proceeding. As a result, heightened attention to confidentiality designations is more appropriate at the time the document is filed with the Court or used in a Court proceeding (if ever), as opposed to the time such a document is produced as part of what may often be a massive discovery response.”).

The *Baxter* court recognized that while confidentiality may be appropriate in early stages in the litigation, it is rarely appropriate when the materials relate to judicial decision making, stating:

Yet the sort of agreement that governs discovery (or arbitration) is even weaker as a reason for appellate secrecy than is a contemporaneous agreement limited to the record on appeal. Allowing such an agreement to hold sway would be like saying that any document deemed provisionally confidential to simplify discovery is confidential forever. That would contradict *Grove Fresh* and its predecessors, which hold that the dispositive documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it? Not only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal. . . . [M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.

Baxter, 297 F.3d at 546–47 (internal citations omitted).

- The Seventh Circuit has also used a balancing approach to determine whether sealing court documents is warranted, recognizing the presumption that the public has a right of access to documents relied on in making dispositive decisions. See *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994).¹⁰ The court stated:

[T]he right of the press to obtain timely access to judicial decisions and the documents which comprise the bases of those decisions is essential. We conclude, therefore, that once the press has adequately demonstrated that its access has been unjustifiably limited, but where there are legitimate concerns of confidentiality, the burden should shift to the litigants to itemize for the court's approval which documents have been introduced into the public domain. We believe that such an approach provides a legitimate means of reconciling the

¹⁰ In *Bond v. Utreras*, the Seventh Circuit recently noted that “[t]o the extent . . . that these cases [*Grove Fresh*, *Wilk*, and other cases addressing collateral litigants’ access to discovery in parallel litigation] are premised upon a principle that “pre-trial discovery must take place in . . . public unless compelling reasons exist for denying the public access to the proceedings,” they have been superseded by the 2000 amendment to Rule 5 of the *Federal Rules of Civil Procedure*.” 585 F.3d at 1068 n.4 (second omission in original) (internal citation omitted).

press's rights with the time constraints facing the trial courts.

Id.

The *Grove Fresh* court also recognized that although “the media’s right of access does not extend to information gathered through discovery that is not part of the public record, the press does have standing to challenge a protective order for abuse or impropriety.”¹¹ *Id.* (citations omitted). The court concluded that “where the rights of the litigants come into conflict with the rights of the media and public at large, the trial judge’s responsibilities are heightened. In such instances, the litigants’ purported interest in confidentiality must be scrutinized heavily.” *Id.* at 899.

Standard for Modifying a Protective Order

- The Seventh Circuit has used the following standard for considering requests for modification to allow for use of protected documents in collateral litigation:

[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.

Wilk v. Am. Med. Ass’n, 635 F.2d 1295, 1299 (7th Cir. 1980) (internal citation omitted);¹² *accord Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 661 (7th Cir. 2001) (quoting *Wilk*, 635 F.2d at 1299); *Jepson*, 30 F.3d at 861 (“*Wilk* has been followed by this and other circuits.”) (citations omitted). *Wilk* distinguished *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), which applied a more stringent standard to requests for modification:

¹¹ The *Bond* court noted that “*Grove Fresh* refers only summarily to the question of the intervenors’ standing,” and that its conclusion that the press has standing to challenge a protective order for abuse or impropriety was based on cases regarding access to sealed documents in court files and a case regarding intervention to challenge a protective order in an ongoing suit. *Bond*, 585 F.3d at 1070 n.5. The *Bond* court differentiated the situation in its case, where the intervenor sought documents that were not in the court file in a lawsuit that had already been settled and dismissed. *Id.*

¹² In *Bond*, the Seventh Circuit recently noted that “*Wilk* did not address either the intervenors’ standing *or* the standards for intervention under Rule 24 but instead skipped directly to the merits of the collateral litigants’ request for access to discovery.” 585 F.3d at 1068 n.4. As previously noted, the *Bond* court also stated that “[t]o the extent . . . that these cases [*Grove Fresh*, *Wilk*, and other cases addressing collateral litigants’ access to discovery in parallel litigation] are premised upon a principle that ‘pre-trial discovery must take place in . . . public unless compelling reasons exist for denying the public access to the proceedings,’ they have been superseded by the 2000 amendment to Rule 5 of the *Federal Rules of Civil Procedure*.” 585 F.3d at 1068 n.4 (second omission in original) (internal citation omitted).

These cases are distinguishable in that the party seeking access in them was the federal government, which in each case had at its disposal special investigatory powers not available to private litigants. Thus, the government could have employed a grand jury in aid of its perjury investigation in *Martindell*, and since the antitrust investigation it conducted in *Eastman Kodak* could have led to criminal or civil proceedings, it might have used either a grand jury or the special “civil investigative demand” created by 15 U.S.C. [§] 1312. As the opinions in both cases suggest, the explicit grant of such extensive investigatory powers should be construed to preclude the implication of supplemental powers, absent unusual circumstances. When the investigator is the government, there is also a unique danger of oppression. This case involves neither circumstance.

Wilk, 635 F.2d at 1300 (footnotes omitted).¹³ The court described the Seventh Circuit’s reference to “exceptional considerations” in *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979), as “an unfortunate choice of words.” *Wilk*, 635 F.2d at 1300. The court recognized that “[a] collateral litigant should not be permitted to exploit another’s discovery in the sense of instituting the collateral litigation simply as a device to obtain access to the sealed information”; that “federal discovery may not be used merely to subvert limitations on discovery in another proceeding”; and that “a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation.” *Id.* (citations omitted).

- The Seventh Circuit recently examined whether a journalist had standing to intervene to seek modification of an agreed protective order. The court explained that “there is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court,” and that “[u]nfiled discovery is private, not public.” *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009). The court rejected the journalist’s argument that a “‘presumption’ of public access emanat[es] from Rule 26(c)’s ‘good cause’ requirement,” stating that “[t]here is no such presumption for discovery that is not part of the court file and therefore no ‘right’ or legally protected interest to support [the journalist’s] standing to intervene.” *Id.* The court also noted that the Rules provide for the use of protective orders for good cause, and that “[p]rotective orders are often entered by stipulation when discovery commences.” *Id.* at 1067.

The court stated that it “ha[d] previously held that permissive intervention is a procedurally appropriate device for bringing a third-party challenge to a protective order,” *id.* at 1068 (citing *Jessup v. Luther*, 227 F.3d 993, 996–97 (7th Cir. 2000); *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d

¹³ As noted earlier, the Second Circuit has clarified that the *Martindell* standard is not limited to requests for modification made by the government. See *TheStreet.com*, 273 F.3d at 229 n.7.

893, 896 (7th Cir. 1994)), but explained that “that was in the context of requests for access to sealed records in the court file (*Jessup, Associated Press*) and requests for intervention made during ongoing litigation (*Grove Fresh*),” *id.* (footnote omitted). The court distinguished the situation present in *Bond*, in which “the litigation was over, the case was dismissed, and [the journalist] wanted to intervene in order to press a claimed right of access to *unfiled* discovery material” *Id.* The court noted that *Grove Fresh, Wilk*, and some other cases had addressed collateral litigants’ access to discovery in parallel litigation and were therefore of little relevance in *Bond*, but stated that “[t]o the extent, however, that these cases are premised upon a principle that “pre-trial discovery must take place in . . . public unless compelling reasons exist for denying the public access to the proceedings,” they have been superseded by the 2000 amendment to Rule 5 of the *Federal Rules of Civil Procedure*.” *Bond*, 585 F.3d at 1068 n.4 (omission in original) (internal citations omitted).

With respect to the standing inquiry, the court stated that “at some fundamental level the proposed intervenor must have a stake in the litigation’ in order to satisfy Article III.” *Id.* at 1070 (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)). The court explained that using permissive intervention to allow a third party to challenge a protective order may not be procedurally proper in some circumstances:

Intervention for purposes of challenging a protective order is an unusual species of permissive intervention that triggers its own unique standing issues. Rule 24(b) allows intervenors to join as parties to a lawsuit when they raise a “claim” or a “defense” that “shares with the main action a common question of law or fact.” FED. R. CIV. P. 24(b)(1)(B). We have held that this language is broad enough to encompass a third-party challenge to a protective order even though it is not a neat fit: The “interest” being asserted by such an intervenor is not really a “claim” or “defense.” *See Jessup*, 227 F.3d at 998; *Grove Fresh*, 24 F.3d at 896; *see also EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (“On its face, Rule 24(b) would appear to be a questionable procedural basis for a third-party challenge to a confidentiality order.”).

Also, when a third party intervenes to challenge a protective order, it cannot be said to have intervened on an existing party’s “side” unless that party *also* opposes the protective order. Where, as in many cases and in this case, the protective order is entered by stipulation of the parties, “the extra litigant . . . is not simply along for the ride” but rather shifts the progress of the lawsuit in a new direction to obtain relief that neither the plaintiff nor the defendant may want. Intervention to challenge a protective order after a case has been dismissed interferes even more fundamentally: It revives a concluded case for the purpose of entertaining an outsider’s claim of interest in the proceeds of the parties’ discovery process. Rule 24(b)

specifically provides that in deciding whether to permit intervention, “the court *must* consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” FED. R. CIV. P. 24(b)(3) (emphasis added). This language suggests that intervention postjudgment—which necessarily disturbs the final adjudication of the parties’ rights—should generally be disfavored.

Id. at 1070–71 (omission in original) (footnote and internal citation omitted). The court did not decide whether a permissive intervenor needs to establish standing to challenge a protective order in an ongoing case, but concluded that it must establish standing after the case has been dismissed. *Id.* at 1071. The court noted that while it did “not decide whether a permissive intervenor needs independent standing to intervene in a live controversy for the purpose of challenging a protective order[,] . . . most cases addressing third-party challenges to protective orders in ongoing lawsuits overlook the standing question, and those that do address it are conflicting.” *Id.* at 1071 n.7 (citations omitted). The court held that “when a third party seeks intervention under Rule 24(b) for the purpose of challenging a protective order in a case or controversy that is no longer live—as when the case has been dismissed and none of the original parties has sought this relief postjudgment—the intervenor must meet the standing requirements of Article III in addition to Rule 24(b)’s requirements for permissive intervention.” *Id.* at 1072. The court concluded that the standing inquiry involved consideration of whether the documents sought had been filed with the court:

Many of our decisions—as well as decisions from other circuits—speak broadly about a “presumption of public access to discovery materials.” *Citizens First Nat’l Bank*, 178 F.3d at 946; *see also Public Citizen*, 858 F.2d at 788–89; *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir.1987) (referring to the public’s “presumptive right of access to discovery materials”). To the extent that this language suggests the existence of a general public right to access the materials that litigating parties exchange in response to discovery requests, it sweeps too broadly. As we will explain, while the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute “judicial records,” the same is not true of materials produced during discovery but not filed with the court. Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery.

It is beyond dispute that most documents filed in court are presumptively open to the public; members of the media and the public may bring third-party challenges to protective orders that shield court records and court proceedings from public view. *See, e.g., Jessup*, 227 F.3d at 997 (“[T]hose who seek access to [sealed court] material have a right to be heard in a manner that gives full

protection to the asserted right.” (quoting *Associated Press*, 162 F.3d at 507)); *Citizens First Nat’l Bank*, 178 F.3d at 945–46 (regarding filing of appellate appendix under seal); *Associated Press*, 162 F.3d at 507 (regarding press access to sealed court records). This right is derived from the common-law principle that courts are public institutions that operate openly—a principle codified at 28 U.S.C. § 452—and judicially imposed limitations on this right are subject to the First Amendment. See, e.g., *Globe Newspaper Co. v. Super. Ct. for Norfolk County*, 457 U.S. 596, 603–06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” (footnote omitted)); see also *Smith v. U.S. Dist. Ct. for S. Dist. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992) (recognizing that although this principle originally stemmed from a need to ensure access to criminal proceedings, the right of access has subsequently been expanded to civil proceedings).

While the public’s right to access court records is not unlimited, see *Nixon*, 435 U.S. at 598, 98 S. Ct. 1306; *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), and Rule 26(c) allows a court to shield certain documents from the public when there is good cause to do so, *Citizens First Nat’l Bank*, 178 F.3d at 945 (public interest in observing judicial process can be overridden if “the property and privacy interests of the litigants . . . predominate in the particular case”), the general right of public access to judicial records is enough to give members of the public standing to attack a protective order that seals this information from public inspection. See *Jessup*, 227 F.3d at 997–98; *Grove Fresh*, 24 F.3d at 897–98; *Associated Press*, 162 F.3d at 506–09.

Bond, 585 F.3d at 1073–74 (alterations and omission in original). The court differentiated the case before it, in which the journalist sought “access to discovery materials that have never been filed with the court and have never influenced the outcome of a judicial proceeding,” explaining that “[t]he Supreme Court has held that the public’s right of access is limited to traditionally publicly available sources of information, and ‘discovered, but not yet admitted information’ is not ‘a traditionally public source of information.’” *Id.* at 1074 (quoting *Seattle Times*, 467 U.S. at 33; citing *Grove Fresh*, 24 F.3d at 897–98 (“[U]ntil admitted into the record, material uncovered during pretrial discovery is ordinarily not within the scope of press access.”)) (alteration in original)). The court further explained that “[a]t common law, pretrial proceedings were closed to the public, and the federal discovery rules have not changed this common-law tradition.” *Id.* (internal citation omitted). The

court stated that “[a]s the Court noted in *Seattle Times*, ‘[d]iscovery rarely takes place in public,’ and the system created by Rule 26 contemplates that the exchange of information in discovery will occur *with minimal judicial involvement*.” *Id.* (emphasis added) (second alteration in original) (internal citation omitted). The court discussed the rationale for differentiating between materials filed with the court and those just exchanged between the parties:

There are good reasons to treat the public’s right to access filed and unfiled discovery materials differently. For starters, “pretrial discovery, unlike the trial itself, is usually conducted in private.” *Citizens First Nat’l Bank*, 178 F.3d at 944. Pretrial discovery—depositions, interrogatories, and the production of documents—“are not public components of a civil trial,” “were not open to the public at common law,” and “in general, are conducted in private as a matter of modern practice.” *Seattle Times*, 467 U.S. at 33, 104 S. Ct. 2199. That the court’s discovery processes and rules are used to require litigants to produce otherwise private information to an opposing party is not enough to alter the legal rights of the general public. Discovery rules are “a matter of legislative grace,” and “[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.” *Seattle Times*, 467 U.S. at 32, 34, 104 S. Ct. 2199. We have said that “[s]ecrecy is fine at the discovery stage, before the material enters the judicial record.” *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002).

The rights of the public kick in when material produced during discovery is filed with the court. *See Seattle Times*, 467 U.S. at 33 & n.19, 104 S. Ct. 2199 (recognizing that the public has a right to access anything that is a “traditionally public source of information” and observing that “courthouse records could serve as a source of public information”). At this point, the documents have been “used in [a court] proceeding,” FED. R. CIV. P. 5(d), and consequently the possibility exists that they could “influence or underpin the judicial decision” and they are therefore presumptively “open to public inspection unless they meet the definition of trade secret or other categories of bona fide long-term confidentiality.” *Baxter Int’l*, 297 F.3d at 545; *see also Citizens First Nat’l Bank*, 178 F.3d at 945.

Id. at 1074–75 (alterations in original) (footnote omitted). The court noted, however, that “the public does not acquire a right to access discovery material just because a judge might review it in camera in the course of discovery proceedings.” *Id.* at 1075 n.8 (citing *TheStreet.com*, 273 F.3d at 233; *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263

F.3d 1304, 1312–13 (11th Cir. 2001); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir. 1995)).

The court further noted that cases suggesting that Rule 26(c) creates a right of public access to discovery lacked force following the 2000 amendment to Rule 5:

It is true that some cases suggest that Rule 26(c) creates a substantive right of public access to discovery. *See San Jose Mercury News, Inc. v. U.S. Dist. Court for N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999); *Public Citizen*, 858 F.2d at 787–90; *Agent Orange*, 821 F.2d at 145–47. These cases, however, were based on a prior version of Rule 5(d) of the *Federal Rules of Civil Procedure* that generally required *all* discovery materials to be filed with the court unless the court ordered otherwise. *See, e.g., Agent Orange*, 821 F.2d at 146 (citing a prior version of Rule 5(d)). The drafters of a 1980 amendment to Rule 5(d) considered establishing a rule that discouraged the filing of all discovery but decided not to; “such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally.” FED. R. CIV. P. 5(d), advisory committee note (1980). Accordingly, some courts read the prior Rule 5(d) together with Rule 26(c) and concluded that these rules implied the existence of a public right to access discovery even if the discovery was not filed with the court. *E.g., Agent Orange*, 821 F.2d at 145–46.

Whatever force these decisions had was destroyed by the 2000 amendment to Rule 5(d), which reversed the longstanding rule generally requiring discovery to be filed with the court. Since 2000, information exchanged in discovery “must *not* be filed” until it is “used in the proceeding” or until “the court orders filing.” FED. R. CIV. P. 5(d) (emphasis added). In its present form, then, Rule 5(d) separates discovery material—regardless of whether it is subject to a Rule 26(c) protective order—into two categories: (1) that which is filed with the court (because it is used in a court proceeding or is ordered to be filed); and (2) that which remains unfiled and therefore not part of the public court record. As the Second Circuit has recognized, this amendment eliminated any implied right of public access to *unfiled* discovery emanating from the procedural rules. *See SEC v. TheStreet.com*, 273 F.3d 222, 233 n. 11 (2d Cir. 2001) (observing that the 2000 amendment to Rule 5(d) “provides no presumption of filing of all discovery materials, let alone public access to them”) (abrogating *Agent Orange*). Accordingly, nothing in Rule 26(c)—either standing alone or when read in conjunction

with the current version of Rule 5(d)—confers substantive rights upon third parties seeking access to the fruits of discovery.

Bond, 585 F.3d at 1075–76 (footnote omitted). The court concluded that the district court had erred by relying on language in cases mentioning a presumption of public access to discovery materials, explaining that “[t]he ‘presumption’ mentioned in these cases simply refers to the general right of the public to access material contained in court files and the limited right of litigants under the First Amendment to ‘disseminate information discovered in advance of trial,’” and that “[i]t is a mistake to conclude, as the district court did, that Rule 26(c) creates a freestanding public right of access to unfiled discovery.” *Id.* at 1076. The court held that the journalist’s standing could not be grounded in Rule 26(c). *Id.* (footnote omitted). The court noted that the journalist had not sought to obtain the documents under the state’s Freedom of Information Act, and that “[t]he protective order d[id] not interfere with [the journalist’s] ability to try to obtain the documents he s[ought] directly from the City under the Illinois FOIA.” *Id.* at 1076 n.10. The court explained that “nothing in the protective order here prohibits the City from disclosing any of its police department records to the public upon request.” *Id.*

The court also concluded that standing could not be based on the First Amendment, explaining that “[t]he only First Amendment concern raised by a protective order limiting disclosure of *unfiled* discovery is the effect such an order may have on a litigant’s free-expression rights, which the Supreme Court has said are limited by the context through which the information is acquired.” *Id.* at 1077. The court continued:

Seattle Times made it clear that “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” 467 U.S. at 32, 104 S. Ct. 2199. As such, “judicial limitations on a party’s ability to disseminate information discovered in advance of trial implicate[] the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.” *Id.* at 34, 104 S. Ct. 2199; *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV.[] 427, 487 (1991) (describing the interest in accessing information produced by discovery as a side effect of—and therefore subordinate to—the judicial system’s central concern of resolving disputes between litigants). Where, as here, the litigants themselves agreed to the protective order and do not seek its modification, this (limited) interest simply is not in play.

Bond, 585 F.3d at 1077 (first and second alterations in original). The court held that the journalist could not claim standing based on a derivative First Amendment right to receive information because there were no “willing speakers.” *See id.* The court noted that while “[m]edia challenges to trial-court gag orders have been allowed where the orders interfere

with the right to receive information from parties and their attorneys who wish to disseminate it,” “a stipulated protective order involves self-imposed secrecy and is therefore not the equivalent of a gag order.” *Id.* (citations omitted). The court explained that “to satisfy Article III on this type of claim, an intervenor must do more than simply assert that a protective order interferes with his inchoate, derivative ‘right’ to receive discovery information” because “[i]magining the existence of a willing speaker runs contrary to the Supreme Court’s command that injuries-in-fact must be ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1078 (citations omitted). The court concluded that “[w]here, as here, the litigants have voluntarily bound themselves to keep certain discovery confidential and do not themselves seek relief from the requirements of the protective order, there is no willing speaker on which to premise a First Amendment right-to-receive claim.” *Id.*

The *Bond* court further noted that “[a] sua sponte postjudgment modification of a protective order does not fall within the court’s ancillary jurisdiction; it is not a matter ‘incidental to’ another matter that is ‘properly before’ the court.” *Id.* The court emphasized that “the protective order did not operate to shield the court’s own records from public view,” explaining that “although a court may have inherent authority to modify a protective order sealing documents maintained in the court file, that’s not what’s at issue here.” *Bond*, 585 F.3d at 1079 (internal citation omitted).

The concurrence would have reached the same conclusion as the majority, but would have done so on the merits, rather than on standing grounds. *Id.* at 1080 (Tinder, J., concurring). Judge Tinder explained:

As the majority correctly explains, the district court erroneously applied a presumption of public access under Rule 26(c) to the unfiled discovery documents exchanged in this case. Such a presumption is no longer tenable in light of the 2000 amendment to Rule 5(d), which provided that discovery documents should not be filed with the court until used in a judicial proceeding. So where, as here, the parties have agreed to a confidentiality order covering unfiled discovery materials which, for good cause, was judicially approved, a district court should honor that order absent some showing of abuse or other extraordinary circumstances. To require any less of a showing would undermine the parties’ reliance on protective orders, which are essential to a fair, efficient discovery process. *See SEC v. TheStreet.com*, 273 F.3d 222, 229–30 (2d Cir. 2001). The district court relied on the public’s significant interest in monitoring police misconduct as the basis for lifting the protective order. In my view, this generalized public interest in allegations of police misconduct, while not insignificant, is, standing alone, not sufficiently compelling to conclude that the parties’ stipulated confidentiality order lacks good cause under Rule 26(c). But [the intervening journalist] presented nothing more so he clearly failed to

make a sufficient showing to undo the protective order.

Id. (internal citation omitted). Judge Tinder argued that while it was a close call, the journalist had standing to challenge the protective order:

Courts have recognized that third parties can challenge a protective order under Rule 26(c) for good cause, even where the order covers non-judicial records that fall outside of the public's common law right of access. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787–88 (1st Cir. 1988) (public interest group had standing to demand good cause under Rule 26(c) to maintain a protective order covering discovery materials); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354–56 (11th Cir. 1987) (per curiam) (journalists had standing to bring a Rule 26(c) challenge to a protective order even though they had no First Amendment right of access to the discovery documents). As we explained in *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994), the press has standing to challenge a protective order for abuse or impropriety. A third party may claim that a litigant is exploiting a court's confidentiality order to insulate embarrassing documents that present no "good cause" for secrecy within the meaning of Rule 26(c). *Id.*; *cf. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944–46 (7th Cir. 1999) (concluding that a protective order allowing the parties to designate virtually any discovery materials as confidential, even those introduced into the judicial record, was overbroad).

After a very thorough review of these and other cases, the majority explains that courts in the past have failed to carefully distinguish between the public's rights of access to judicial records and to unfiled discovery materials, and that Rule 26(c)'s "good cause" requirement does not support any "presumption" of public access to the latter. That is true, and because the information sought here has never been filed with the court, this matter calls for an even more stringent review of standing than the host of cases involving court-filed documents. But I respectfully suggest that it does not follow that a third-party intervenor necessarily lacks standing to bring a Rule 26(c) challenge to a protective order covering unfiled discovery documents. Although unfiled discovery does not fall within the public's presumptive right of access, the public still "has an interest in what goes on at all stages of a judicial proceeding." *Citizens First Nat'l Bank*, 178 F.3d at 945. As noted, third-party Rule 26(c) claims may prevent litigants from abusing a court-approved confidentiality order to seal whatever they want. *See*

Grove Fresh, 24 F.3d at 898. Other circumstances (not present here) could arise where a third party shows such an “extraordinary circumstance or compelling need” for unfiled discovery documents that a district court should modify an order protecting those documents. *TheStreet.com*, 273 F.3d at 229. [The journalist’s] request came so late in the life of this case and is so lacking in merit that it is tempting to simply join in the majority’s well-reasoned and persuasive standing conclusion. However, I hesitate to do so because I fear that a determination that [the journalist] lacks standing might be read as a categorical bar to third parties who would seek unfiled discovery materials that are subject to protective orders. While circumstances in which such requests might be granted ought to be exceedingly rare, I think [the journalist] presented just enough to the district court to get in the door to argue his position.

Id. at 1080–81 (internal citation omitted).

EIGHTH CIRCUIT

Standard for Entering a Protective Order

- A court in the Eighth Circuit has explained: “Under Rule 26(c), a court may grant a protective order only upon a showing of good cause by the moving party. The movant must articulate ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Pochat v. State Farm Mutual Auto. Ins. Co.*, No. 08-5015-KES, 2008 WL 5192427, at *3 (D.S.D. Dec. 11, 2008) (internal citation omitted) (quoting *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)). “Such determination must also include a consideration of the relative hardship to the non-moving party should the protective order be granted.” *Gen. Dynamics Corp.*, 481 F.2d at 1212 (citation omitted). The *Pochat* court noted that protective orders over discovery require “balancing between public and private concerns.” *Pochat*, 2008 WL 5192427, at *3 (quoting *Pansy*, 23 F.3d at 786). The court explained:

In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process [T]he court . . . must balance the requesting party’s need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.

Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they

should “be disclosed only in a designated way,” as authorized by the last clause of Rule 26(c)(7) Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. at *4 (alterations and omissions in original) (internal quotation marks omitted) (quoting *Pansy*, 23 F.3d at 787). The court described various factors listed in *Pansy* that might be considered in determining whether to enter a protective order. *See id.* The court emphasized that “[t]hese factors . . . ‘are unavoidably vague and are of course not exhaustive’ so as to provide courts with ‘the flexibility needed to justly and properly’ resolve discovery disputes.” *Id.* (citing *Pansy*, 23 F.3d at 787). The court rejected a proposed protective order that would allow the parties to designate material they believed contained trade secrets or other confidential material because the court was “concerned that this broad language will serve to give each party ‘carte blanche to decide what portions of the record shall be kept secret.’” *Id.* at *10 (quoting *Citizens First Nat’l Bank*, 178 F.3d at 945).

Standard for Entering a Sealing Order

- In the context of reviewing a sealing order entered by a bankruptcy judge, the Eighth Circuit has recognized the public’s right to inspect judicial records and stated that compelling reasons are necessary to infringe on that right. *See In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (noting that courts recognize a general right to inspect judicial records and that courts have supervisory power over their records and may deny access if the records may be used for improper purposes, but that while “the court is given this supervisory power [to deny access], ‘only the most compelling reasons can justify non-disclosure of judicial records’” (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005) (internal brackets and quotations omitted))).
- In another case, the Eighth Circuit stated that whether to seal a court record is a decision within the district court’s discretion. *See Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340 (S.D. Iowa 1993) (“[T]he decision of whether court records should be sealed is one committed to the sound discretion of the trial court.” (citing *Webster Groves Sch. Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1374 (8th Cir. 1990))). The court explained that “[w]hile recognizing a common law right of access to court records, the Eighth Circuit has expressly declined to adopt a ‘strong presumption’ of common law access.” *Id.* The court noted that there is a “need to balance the competing interests involved, and to make this determination in light of the facts and circumstances of this particular case.” *Id.* at 341 (citations omitted). The court concluded that “the public good would be substantially disserved if the introduction of a document in a civil trial deprived it of its otherwise confidential status.” *Id.* at 342. The court continued: “Discovery, often a contentious and

difficult process in complex cases, would become even more contentious and expensive, if there was no assurance of continued protection for confidential business information.” *Id.* (citing *Seattle Times*, 467 U.S. at 34); *State ex rel. Butterworth v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993)). The court explained that “[c]oncern with the ‘efficient administration of justice’ is also a valid interest to be considered in making this determination [of whether to grant access].” *Id.* (citation omitted). The court noted that “[n]either the Supreme Court nor the Eighth Circuit has recognized a constitutional right of access in a civil case,” but concluded that even if a constitutional right exists, the order at issue only sealed a small number of exhibits in comparison to the number entered at trial and did so to protect a legitimate interest in confidentiality. *See Jochims*, 151 F.R.D. at 342 n.8.

- In a district court case, the court noted that the Eighth Circuit had recognized a general right to inspect judicial records, and that “[a] party seeking closure or sealing of court documents must show that a restriction of the right of public access is necessitated by a compelling government interest.” *SEC v. Shanahan*, No. 4:06-MC-546 CAS, 2006 WL 3330972, at *3 (E.D. Mo. Nov. 15, 2006) (citing *Goff v. Graves*, 362 F.3d 543, 550 (8th Cir. 2004)). The court emphasized that “[i]f a district court decides to close a proceeding or seal certain documents, it must explain why closure or sealing was necessary and why less restrictive alternatives were not appropriate.” *Id.* at *4 (citing *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 574 (8th Cir. 1988) (citation omitted)). The court noted that “Eighth Circuit precedent indicates that in order to seal records or documents, there must be a compelling *governmental* interest.” *Id.* (citation omitted) The court distinguished private interests, which it deemed insufficient to warrant sealing:

In the absence of evidence that court files might be used for improper purposes such as to “gratify private spite” or “promote public scandal,” the respondents’ interest in keeping their names out of the public record is not a governmental interest at all, but rather a private interest. “The mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.”

Id. (internal citation omitted).

- Another district court described the following standard for sealing court documents:

There is a common-law right of access to judicial records. *See Webster Groves Sch. Dist. v. Pulitzer Publ’g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990). The Eighth Circuit has held that this right of access “is not absolute, but requires a weighing of competing interests.” *Id.* A court has supervisory power over its own records, and the decision to seal a file is within the court’s discretion. *Id.* The Court finds that Guidant and Duron have a heightened burden to overcome the presumptive right of the public to access of the briefs

and supporting documents at issue because they were filed in support of and in opposition to motions for summary judgment. *See Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (“[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.”).

Duron v. Guidant Corp. (In re Guidant Corp. Implantable Defibrilators Prods. Liab. Litig.), 245 F.R.D. 632, 636 (D. Minn. 2007) (alteration in original). After the parties objected to unsealing certain documents, the court reviewed the documents in camera “for good cause under FED. R. CIV. P. 26[,] and weighed the competing interests regarding the common-law right of access to judicial records.” *Id.* (footnote omitted). Specifically, “[t]he Court determined which documents contain[ed] trade secrets, proprietary information, or other confidential information and then weighed [the intervenor’s] need for disclosure against the potential harm that unsealing m[ight] cause [the opposing parties].” *Id.*

- Another court concluded that “there is no established right of public access to prejudgment records in civil cases.” *Simon v. G.D. Searle & Co.*, 119 F.R.D. 683, 684 (D. Minn. 1987) (citation omitted). The court concluded that it had “discretion to deny access to documents filed, but not admitted into evidence or relied upon by the Court.” *Id.* (citing *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Tavoulaareas v. Washington Post Co.*, 111 F.R.D. 653 (D.D.C. 1986)). The court also found that “[a]t best, the presumption of public access to judicial records has force only when the Court relies on particular documents to determine the litigants’ substantive rights,” *id.* (citing *Anderson*, 805 F.2d at 13), and explained that “even in cases which do not involve confidential documents, this Court, as a matter of course, has never sanctioned wholesale filing of discovery materials, depositions or exhibits until it is clear said materials will be relied on and considered by the Court,” *id.*

Standard for Modifying a Protective Order

- The Eighth Circuit has at least implied that a party requesting modification of a protective order must show intervening circumstances warranting modification. In *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 952 (8th Cir. 1979), a defendant requested that the court dissolve a protective order to allow him to comply with subpoenas issued by a congressional subcommittee investigating pricing practices in the meat industry. The district court partially lifted the protective order to allow the defendant to respond to the subpoena. *Id.* The Eighth Circuit vacated the order modifying the protective order, noting that the district court had made the modification “without any showing that *intervening circumstances* had in any way obviated the potential prejudice to [the protected party]”¹⁴ *Id.* at 954 (emphasis added).

¹⁴ On reconsideration, the Eighth Circuit “adhere[d] in general to the views expressed” in its original opinion, but found that formal issuance of mandamus had been improvident because compelling reinstatement of the protective order would not alter the status quo, as there was no basis for requiring the Subcommittee to return the documents it obtained and the order lifting the protective order had only pertained to the documents provided in response to the subpoena, meaning

- A district court has explained that “[t]he party seeking to modify the protective order bears the burden of showing good cause for the modification,” *Guzhagin v. State Farm Mut. Auto. Ins. Co.*, No. 07-4650 (JRT/FLN), 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (quoting *Medtronic, Inc. v. Boston Sci. Corp.*, No. Civ. 99-1035, 2003 WL 352467, at *1 (D. Minn. Feb. 14, 2003)), and that “[w]hen a party to a stipulated protective order seeks to modify that order, ‘that party must demonstrate particular good cause to obtain relief,’” *id.* (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa 1992)). The court recognized that “[c]ourts outside [the Eighth] Circuit have noted a ‘sufficient need for modification . . . to avoid duplicative discovery when parties in other litigation seek to obtain discovery in concluded litigation,’” *id.* (omission in original) (quoting *SmithKline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002)), but explained that “*SmithKline* cautions . . . against modifying protective orders ‘in a controversy with which [the Court] is not familiar and over which it lacks control,’” *id.* (alteration in original) (quoting *SmithKline*, 210 F.R.D. at 166). The court implied that “compelling need” was required to warrant modification of a protective order. *See id.* (“State Farm has therefore satisfied its burden by demonstrating *compelling need* for modification.” (emphasis added)).
- Another district court explained the standard as follows:

“When a party seeks modification of a confidentiality order, they must ‘come forward with a reason to modify the order.’” *Arnold v. Pennsylvania, Dep’t of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994)). Specifically, “[t]he party seeking the modification must explain why its need for the materials outweighs existing privacy concerns.” *MSC Software Corp. v. Altair [Eng’g], Inc.*, No. 07-CV-12807, 2008 WL 2478313, at *1 (E.D. Mich. June 17, 2008) (Slip Copy). Some courts hold the burden is not easily met as there is a “stringent standard for modification,” . . . “a confidentiality order can only be modified if an extraordinary circumstance or compelling need warrants the requested modification.” *Pansy*, 23 F.3d at 789 (citing cases). In contrast, other courts hold the movant to a more lenient standard by incorporating a balancing test. *Id.* at 789–90 (citing cases). The *Pansy* court identified a number of factors for the good cause balancing test used to issue or modify a protective order including: (1) the interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; and (3) the parties’ reliance on the protective order. *Id.* at 787–89.

Streck, Inc. v. Research & Diagnostic Sys., Inc., No. 8:06CV458, 2008 WL 2813081, at *3

that any further disclosures would violate even the modified protective order. 601 F.2d at 956.

(D. Neb. July 18, 2008) (first alteration and omission in original). The court indicated that compelling need and extraordinary circumstances were sufficient (and perhaps necessary) for modification. *See id.* at *4 (“The plaintiff has presented a legitimate and not improper purpose for use of the documents outside this litigation. The plaintiff’s need is *compelling* and presents an *extraordinary circumstance*.” (emphasis added)).

- Another case found that the magistrate judge had erred by relying on the standard for modification set out in *Wilk* when the “controlling standard is found in *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert denied*, 441 U.S. 907, 99 S. Ct. 1997, 60 L. Ed. 2d 376 (1979).” *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993). The court explained that *Iowa Beef Processors* set out the following standard:

[T]he Eighth Circuit recognized that the initial showing of good cause for entry of a protective order under FED. R. CIV. P. 26(c) is on the party seeking protection. However, when an attempt is made to amend or lift that protection, there must be a showing that intervening circumstances have obviated or eliminated any potential prejudice to the protected party. I believe that *Bagley*’s requirement of a showing of intervening circumstances implicitly places the burden of making the showing on the party seeking to amend or lift the protective order. This standard is fully applicable to a petition by plaintiffs in other litigation, such as intervenors.

Id. (internal citations omitted).

NINTH CIRCUIT

Standard for Entering a Protective Order

- In *Pintos v. Pacific Creditors Association*, 605 F.3d 665 (9th Cir. 2010),¹⁵ the Ninth Circuit explained the differences between the standard for entering a protective order and the standard for entering a sealing order:

Two standards generally govern motions to seal documents like the one at issue here. First, a “compelling reasons” standard applies to most judicial records. *See Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (holding that “[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the ‘compelling reasons’ standard”); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003). This

¹⁵ The earlier version of this memo discussed *Pintos v. Pacific Creditors Association*, 565 F.3d 1106 (9th Cir. 2009). That opinion was amended and superseded on denial of rehearing by the May 21, 2010 opinion cited in this version of the memo. The amended opinion added language to a footnote that is not relevant for purposes of this memo.

standard derives from the common law right “to inspect and copy public records and documents, including judicial records and documents.” *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that “compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure.” *Id.* at 1178–79 (internal quotation marks and citations omitted).

Second, a different standard applies to “private materials unearthed during discovery,” as such documents are not part of the judicial record. *Id.* at 1180. Rule 26(c) of the Federal Rules of Civil Procedure governs here, providing that a trial court may grant a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

The relevant standard for purposes of Rule 26(c) is whether “‘good cause’ exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). This “good cause” standard presents a lower burden for the party wishing to seal documents than the “compelling reasons” standard. The cognizable public interest in judicial records that underlies the “compelling reasons” standard does not exist for documents produced between private litigants. *See Kamakana*, 447 F.3d at 1180 (holding that “[d]ifferent interests are at stake with the right of access than with Rule 26(c)"); *Foltz*, 331 F.3d at 1134 (“When discovery material is filed with the court . . . its status changes.”).

The “good cause” standard is not limited to discovery. In *Phillips*, we held that “good cause” is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion. 307 F.3d at 1213 (“when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public’s right of access is rebutted”). Nondispositive motions “are often ‘unrelated’, or only tangentially related, to the underlying cause of action,” and, as a result, the public’s interest in accessing dispositive materials does “not apply with equal force” to nondispositive materials. *Kamakana*, 447 F.3d at 1179. In light of the weaker public interest in nondispositive materials, we apply the “good cause” standard when parties wish to keep them under seal. Applying the “compelling interest” standard under these circumstances would needlessly “undermine a district

court's power to fashion effective protective orders." *Foltz*, 331 F.3d at 1135.

Id. at 677–78 (alterations and omissions in original) (footnote omitted).

- Another court has explained: “It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where ‘good cause’ is shown.” *AGA Shareholders, LLC v. CSK Auto, Inc.*, No. CV-07-62-PHX-DGC, 2007 WL 4225450, at *1 (D. Ariz. Nov. 28, 2007) (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999)). The court stated:

For good cause to exist under Rule 26(c), “the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted.” *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002). “Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citation omitted). Rather, the party seeking protection must make a “particularized showing of good cause with respect to [each] individual document.” *San Jose Mercury News*, 187 F.3d at 1102.

Id. (alteration in original).

Standard for Entering a Sealing Order

- The Ninth Circuit has also explained that with respect to court documents, the showing that must be made to seal the documents depends on whether the documents are associated with a dispositive motion. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003). The court explained that the Ninth Circuit has “a strong presumption in favor of access to court records,” but that “[t]he common law right of access . . . is not absolute and can be overridden given sufficiently compelling reasons for doing so.” *Id.* at 1135 (citing *San Jose Mercury News*, 187 F.3d at 1102); *see also Pintos*, 605 F.3d at 678 (noting that “[t]o limit this common law right of access, a party seeking to seal judicial records must show that ‘compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure,’” but explaining that “[i]n light of the weaker public interest in nondispositive materials, we apply the ‘good cause’ standard when parties wish to keep them under seal” (first alteration and omission in original) (quoting *Kamakana*, 447 F.3d at 1178–79 (internal quotation marks and citations omitted))); *Ctr. for Food Safety v. Johanns*, 310 F. App’x 964, 965 (9th Cir. 2009) (unpublished) (“The applicable standards for sealing documents are drawn from *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), and a compelling interest was required to have been shown in this case because the documents were attached to a

dispositive motion.”). The *Foltz* court explained that in determining whether the common law right of access can be overridden, a court should consider all relevant factors, including:

the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.

Foltz, 331 F.3d at 1135 (omission in original) (quotation marks omitted) (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)); accord *Pintos*, 605 F.3d at 679 (“Under the ‘compelling reasons’ standard, a district court must weigh ‘relevant factors,’ base its decision ‘on a compelling reason,’ and ‘articulate the factual basis for its ruling, without relying on hypothesis or conjecture.’” (footnote omitted) (quoting *Hagestad*, 49 F.3d at 1434)). The court explained that with respect to sealed discovery attached to nondispositive motions, “‘the usual presumption of the public’s right of access is rebutted,’” and “‘good cause’ suffices to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.” *Foltz*, 331 F.3d at 1135 (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)). The court held that “the presumption of access is not rebutted where . . . documents subject to a protective order are filed under seal as attachments to a dispositive motion,” and that in that scenario, “[t]he *Hagestad* ‘compelling reasons’ standard continues to apply.” *Id.* at 1136. The court explained that “[t]here are good reasons to distinguish between dispositive and nondispositive motions” because “[i]n *Seattle Times*, the Supreme Court noted that ‘[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action,’” but “[t]he same cannot be said for materials attached to a summary judgment motion because ‘summary judgment adjudicates substantive rights and serves as a substitute for trial.’” *Id.* (third alteration in original) (citations omitted).

- In *Pintos*, the court emphasized that the “compelling reasons” standard applicable to most requests to seal judicial records is a higher standard than the “good cause” standard applicable under Rule 26(c) to private documents exchanged in discovery, stating: “A determination by the district court that good cause exists for sealing Experian’s documents does not establish that there are ‘compelling reasons’ to do so.” *Pintos*, 605 F.3d at 679 (citing *Kamakana*, 447 F.3d at 1180 (“holding that ‘a ‘good cause’ showing . . . will not suffice to fulfill the ‘compelling reasons’ standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments’” (omission in original))).

Standard for Modifying a Protective Order

- The Ninth Circuit has explained that where the court enters a blanket protective order

without requiring the party seeking confidentiality to show good cause for specific documents, upon a challenge by intervenors to the asserted confidentiality, the district court should require a showing of good cause for continued protection of the documents under Rule 26(c). *See Foltz*, 331 F.3d at 1131. The court explained that it “strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation” because “[a]llowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.” *Id.* (citations omitted). The court quoted the Seventh Circuit standard described in *Wilk*, and stated: “Where reasonable restrictions on collateral disclosure will continue to protect an affected party’s legitimate interests in privacy, a collateral litigant’s request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted.” *Id.* at 1132 (citing *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265–66 (9th Cir. 1964)). But the court cautioned:

[A] court should not grant a collateral litigant’s request for such modification automatically. As an initial matter, the collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein. Requiring a showing of relevance prevents collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding. *See Wilk*, 635 F.2d at 1300. Such relevance hinges “on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings.” Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 366–67 (1999).

Id.

The court elaborated on the standard for considering the relevance of the documents sought to the collateral litigation:

The case law suggests that the court that entered the protective order should satisfy itself that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided by modifying the protective order. *See Wilk*, 635 F.2d at 1300 (comparing complaints to conclude that “much, if not most,” of the protected discovery would be eventually discoverable in the collateral suit); *United Nuclear*, 905 F.2d at 1428 (upholding the modification of a protective order but admonishing the district court to leave the specific “[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation” to the collateral courts (quoting *Superior Oil Co.*

v. Am. Petrofina Co., 785 F.2d 130, 130 (5th Cir. 1986) (internal quotation marks omitted)). No circuits require the collateral litigant to obtain a relevance determination from the court overseeing the collateral litigation prior to requesting the modification of a protective order from the court that issued the order. The court that issued the order is in the best position to make the relevance assessment for it presumably is the only court familiar with the contents of the protected discovery.

Id. (alterations in original) (footnote omitted). But the court explained that the relevance inquiry is limited to whether a modification of the protective order is appropriate, and does not extend into determining whether the collateral litigant will actually obtain the documents:

Because the district court that issued the order makes only a rough estimate of relevance, however, the only issue it determines is whether the protective order will bar the collateral litigants from gaining access to the discovery already conducted. Even if the issuing court modifies the protective order, it does not decide whether the collateral litigants will ultimately obtain the discovery materials. As the Fifth and Tenth Circuits have noted, once the district court has modified its protective order, it must refrain from embroiling itself in the specific discovery disputes applicable only to the collateral suits.

Id. at 1132–33 (citation omitted).

The court also explained that in addition to considering the relevance of the materials sought through modification of the protective order, the court should consider other factors:

Of course, before deciding to modify the protective order, the court that issued it must consider other factors in addition to the relevance of the protected discovery to the collateral litigation. In particular, it must weigh the countervailing reliance interest of the party opposing modification against the policy of avoiding duplicative discovery. *See Beckman*, 966 F.2d at 475. However, we have observed that “[r]eliance will be less with a blanket [protective] order, because it is by nature overinclusive.” *Id.* at 476. As noted above, a party seeking the protection of the court via a blanket protective order typically does not make the “good cause” showing required by Rule 26(c) with respect to any particular document. Thus, reliance on a blanket protective order in granting discovery and settling a case, without more, will not justify a refusal to modify. “[A]ny legitimate interest . . . in continued secrecy as against the public at large can be accommodated by placing [the collateral

litigants] under the same restrictions on use and disclosure contained in the original protective order.” *United Nuclear*, 905 F.2d at 1428; *see also Beckman*, 966 F.2d at 476.

Id. at 1133 (alterations and omission in original). The court stated that “the extent to which a party can rely on a protective order depends on the extent to which the order did reasonably induce the party to allow discovery as opposed to settling the case.” *Id.* at 1137–38 (citations omitted).

- The Ninth Circuit has rejected application of the Second Circuit’s “extraordinary circumstances” test for modification. *See Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) (“The ‘extraordinary circumstances’ test is incompatible with our circuit’s law. Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation.”). The *Beckman* court recognized the countervailing concern that modification would result in slowing down discovery in the initial litigation, but found that “legitimate interests in privacy can be protected by putting the intervenors under the same restrictions as those contained in the original protective order.” *Id.* (citing *United Nuclear*, 905 F.2d at 1428). The court also recognized the importance of protecting the parties’ reliance interests, but explained that “[t]he extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case.” *Id.* The court noted that “reliance would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege,” *id.* (citing *Pub. Citizen*, 858 F.2d at 791), and that “[r]eliance will be less with a blanket order, because it is by nature overinclusive,” *id.* at 476 (citing *Pub. Citizen*, 858 F.2d at 790).
- In the context of a party seeking modification of a stipulated protective order, one court explained that “district courts have inherent authority to grant a motion to modify a protective order where ‘good cause’ is shown.” *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 201 (N.D. Cal. 2009) (citation omitted). “A party asserting good cause bears the burden to show that specific prejudice or harm will result if the motion is not granted.” *Id.* (citation omitted). The court explained that “[i]n the Ninth Circuit, issues concerning the scope of protective orders for confidential information entail[] a balancing test of the conflicting interests between the protection of Rule 26(c) and the broad mandate of the admissibility of information in discovery conferred by Rule 26(b)(1) of the Federal Rules of Civil Procedure.” *Id.* at 204–05 (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992), *cert. denied*, 506 U.S. 869 (1992)). The court found that the party seeking modification, who had agreed to a stipulated protective order, bore the burden of showing good cause for modification to use documents in potential collateral litigation alleging misappropriation of trade secrets. *See id.* at 205. The court concluded that because there was questionable use of proprietary information, good cause was shown for modification to allow the plaintiff to protect itself by using documents for separate trade secret litigation. *See id.* The court stated: “A good cause analysis under Federal Rule of Civil Procedure 26(c) entails a balancing of the needs for discovery against the need for

confidentiality. The typical analysis considers whether sufficient cause exists to protect such information from being disclosed to the public.” *Id.* The court noted that “[i]n the Ninth Circuit, there is a strong policy ‘favor[ing] access to discovery materials to meet the needs of parties engaged in collateral litigation,’” and that “Ninth Circuit precedent also looks to the needs of parties engaged in pending litigation and, in particular, the reliance interests on the protective order of the party opposing its modification.” *CBS Interactive*, 257 F.R.D. at 206 (second alteration in original) (citations omitted). The court concluded that “[m]ere reliance on a blanket protective order does not justify a refusal to modify it when a reasonable request for disclosure has been made.” *Id.* (citation omitted). The court explained that “[n]ormally, the court must also weigh the countervailing reliance interest of the party opposing modification against the likelihood that the collateral action is sufficiently related to the instant action, such that a significant amount of duplicative discovery may be avoided by granting the modification request.” *Id.* (citing *Foltz*, 331 F.3d at 1133).

- Another court explained that while the Ninth Circuit favors providing access to documents for collateral litigation, “adoption of such a policy in no way gives those seeking intervention carte blanche to obtain all discovery produced as part of an underlying action, as a matter of course.” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2008 WL 4191780, at *1 (N.D. Cal. Sept. 10, 2008). The court discussed the considerations used by the court in *Foltz*, but also considered the additional factor of whether the underlying litigation in which the protective order was entered is still pending. *See id.* at *2. The court explained that where the underlying action is still pending, “the court must pay careful consideration . . . before granting movants’ request [to intervene to modify the protective order], so as not to prejudice any of the existing parties or ongoing litigation in the case.” *Id.* In addition, the court explained that it is important to consider whether collateral litigants are seeking modification “merely to subvert limitations on discovery in collateral litigation.” *Id.*

TENTH CIRCUIT

Standard for Entering a Protective Order

- The Tenth Circuit has stated:

Under Federal Rule of Civil Procedure 26(c), for “good cause” a court may issue a protective order regarding discovery “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Such an order may forbid the disclosure of discovery, *see* FED. R. CIV. P. 26(c)(1)(A), and require that depositions be sealed and opened only upon court order, *see id.* Rule 26(c)(1)(F). The “good cause” standard of Rule 26(c) is “highly flexible, having been designed to accommodate all relevant interests as they arise.” *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C. Cir. 1999).

Rohrbough v. Harris, 549 F.3d 1313, 1321 (10th Cir. 2008).

- The Tenth Circuit has recognized that blanket protective orders may be necessary in complex cases to allow discovery to proceed:

These stipulated “blanket” protective orders are becoming standard practice in complex cases. *See* MANUAL FOR COMPLEX LITIGATION, SECOND, § 21.431 (1985). They allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, “to secure the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1; *see generally In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356–57 (11th Cir. 1987); Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 9–11 (1983).

United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

- A court in the Tenth Circuit has stated: “The party seeking a protective order has the burden to show good cause for it. To establish good cause, that party must submit ‘a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Wilson v. Olathe Bank*, 184 F.R.D. 395, 397 (D. Kan. 1999) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)) (internal citation omitted).
- In another case, the court elaborated:

The decision to enter a protective order lies within the sound discretion of the court. Despite this broad discretion, the court may only issue a protective order if the moving “party demonstrates that the basis for the protective order falls within one of the categories enumerated in FED. R. CIV. P. 26(c)[,]” *i.e.*, that the requested order is necessary to protect the party “from annoyance, embarrassment, oppression, or undue burden or expense.” “Rule 26(c) does not provide for any type of order to protect a party from having to provide discovery on topics merely because those topics are overly broad or irrelevant, or because the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence.” “Although a party may object to providing discovery on the basis that the request is overly broad, irrelevant or not calculated to lead to the discovery of admissible evidence, the court may only rule on the validity of such an objection in the context of a motion to compel.” “Such an objection is not a basis upon which the court may enter a Rule 26(c) protective order.”

P.S. v. Farm, Inc., No. 07-CV-2210-JWL, 2009 WL 483236, at *3 (D. Kan. Feb. 24, 2009) (footnotes omitted).

Standard for Entering a Sealing Order

- The Tenth Circuit has discussed the following standard for sealing court documents:

Courts have long recognized a common-law right of access to judicial records. This right, however, is not absolute. The “presumption of access . . . can be rebutted if countervailing interests heavily outweigh the public interests in access.” *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). “The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.” *Id.*

Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007) (some internal citations omitted). In *Mann*, the Tenth Circuit also found it important that much of the information contained in the complaint sought to be sealed had been previously disclosed in other public court proceedings, undermining the asserted privacy concerns. *See id.*

- In *Riker v. Federal Bureau of Prisons*, 315 F. App’x 752 (10th Cir. 2009) (unpublished), *cert. denied*, *Jordan v. Federal Bureau of Prisons*, 130 S. Ct. 431 (2009), the court reiterated the standard for sealing discussed in *Mann*, stating:

“Courts have long recognized a common-law right of access to judicial records.” [*Mann*, 477 F.3d at 1149] (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)). “The right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes.” *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985); *see also FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (“The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public’s right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.”). But this right of access is not absolute; it can be rebutted when other interests outweigh the public interests in access. *Mann*, 477 F.3d at 1149. “All courts have supervisory powers over their own records and files. Thus a court, in its discretion, may seal documents if the public’s right of access is outweighed by competing interests.” *Hickey*, 767 F.2d at 708 (citations and quotation marks omitted). “The party seeking to overcome the presumption [of access] bears the burden of showing some significant interest that outweighs the presumption.” *Mann*,

477 F.3d at 1149 (quotation marks omitted). Whether a trial court exercises sound discretion will be based on the facts and circumstances of the individual case and the weighing of the parties' interests. See *Hickey*, 767 F.2d at 708.

Id. at 754–55 (second alteration in original). The court continued:

[W]e first consider the public's interest in the documents. “[J]udicial records are public documents almost by definition, and the public is entitled to access by default.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). Especially “where documents are used to determine litigants’ substantive legal rights, a strong presumption of access attaches.” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006); see also *Standard Fin. Mgmt. Corp.*, 830 F.2d at 409 (“[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies[.]”). On the other hand, where the documents “play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason.” *Lugosch*, 435 F.3d at 121 (quotation marks omitted).

Id. at 755 (second, third, and fourth alterations in original).

With respect to the First Amendment analysis, the court stated:

The Supreme Court has not yet ruled that there is a constitutional right to access court documents. See *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998); *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997). Even assuming, without deciding, that there is a First Amendment right to court documents, that right is not absolute. See *Globe Newspaper*, 457 U.S. at 606, 102 S. Ct. 2613. “Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.” *Id.* at 606–07, 102 S. Ct. 2613.

Id. at 756 (omission in original).

- In a district court case, the court explained that it had previously discussed the standard for sealing the record of a case in a nondiscovery context:

Federal courts recognize a common-law right of access to judicial records, although that right is not absolute. Whether to allow access at the district court level is left to the discretion of the district court, which has supervisory control over its own records and files. In exercising that discretion, the district court must consider the relevant facts and circumstances of the case and balance the public's right of access, which is presumed paramount, with the parties' interests in sealing the record. The public has an interest "in understanding disputes that are presented to a public forum for resolution" and "in assuring that the courts are fairly run and judges are honest." Courts have denied access in cases in which the court files have been sought for improper purposes such as promoting public scandal or harming a business litigant's competitive standing.

Bryan v. Eichenwald, 191 F.R.D. 650, 652 (D. Kan. 2000) (quotation marks omitted) (quoting *Ramirez v. Bravo's Holding Co.*, No. Civ. A. 94-2396-GTV, 1996 WL 507238, at *1 (D. Kan. Aug. 22, 1996)). The court explained that "[u]nless a party establishes a 'public or private harm sufficient to overcome the public's right of access to judicial records,' the court declines to seal any part of the record in the case." *Id.* (quoting *Ramirez*, 1996 WL 507238, at *1). The court emphasized that even if the parties agree to sealing, the court must independently determine whether sealing is appropriate. *See id.* ("The fact that all litigants favor sealing the record is of interest, but not determinative.") (quoting *Ramirez*, 1996 WL 507238, at *1)).

The *Bryan* court explained that balancing public and private interests is necessary regardless of the stage of the litigation:

Although cognizant of the inapplicability of FED. R. CIV. P. 26(c) in non-discovery contexts . . . , the court, nevertheless, views the standards for permitting documents to be filed under seal to be the same regardless of the stage of litigation [in which] the issue arises. At the discovery stage, the court may speak in terms of "good cause." At other stages, the court may simply refer to its discretion to supervise its own records and files. At whatever stage of the litigation, however, the movant must demonstrate a public or private harm sufficient to overcome the public's right of access to judicial records.

Id. at 652–53; *see also Allen v. Kline*, No. 07-2037-KHV, 2007 WL 3396470, at *2 (D. Kan. Nov. 13, 2007) (noting the same standard and explaining that "political consequences do not amount to a public harm that would be suffered if the underlying motion were filed on an unsealed basis").

- Another court stated the standard as follows:

It is well settled that federal courts recognize a common-law right of access to judicial records.[] This right derives from the public’s interest “in understanding disputes that are presented to a public forum for resolution” and is intended to “assure that the courts are fairly run and judges are honest.” This public right of access, however, is not absolute. As federal district courts have supervisory control over their own records and files, the decision whether to allow access to those records is left to the court’s sound discretion. In exercising that discretion, the court must consider the relevant facts and circumstances of the case and balance the public’s right of access, which is presumed paramount, with the parties’ interests in sealing the record or a portion thereof. Documents should be sealed “only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.”

Hatfield v. Price Mgmt. Co., No. 04-2563-JWL-DJW, 2005 WL 375665, at *1 (D. Kan. Feb. 16, 2005) (footnotes omitted).

- In another case, the court recognized that a party seeking sealing must demonstrate a public or private harm that overcomes the public’s right of access, regardless of the stage of the litigation, but noted that “[o]ther courts in [its] district have distinguished somewhat between the broad latitude the court has to accord confidentiality to the parties’ discovery and other preliminary proceedings, and the narrower discretion the court has in issuing orders resolving litigation.” *Snyder-Gibson v. Cessna Aircraft Co.*, No. 06-1177-JTM, 2007 WL 527835, at *5 & n.6 (D. Kan. Feb. 14, 2007) (citing *Vulcan Materials Co. v. Atofina Chems. Inc.*, 355 F. Supp. 2d 1214, 1216–18 (D. Kan. 2005)).

Standard for Modifying a Protective Order

- The Tenth Circuit has explained that a district court has discretion to modify a protective order and discussed the competing interests to be considered in deciding whether modification is appropriate:

Allowing modification of protective orders for the benefit of collateral litigants tends to undermine the order’s potential for more efficient discovery. But when a collateral litigant seeks access to discovery produced under a protective order, there is a countervailing efficiency consideration—saving time and effort in the collateral case by avoiding duplicative discovery. In striking this balance, some circuits have adopted a presumption in favor of the continued integrity of the protective order, *see, e.g., Agent Orange*, 821 F.2d at 147–48 (protective orders modifiable only under

extraordinary circumstances), others have tipped the balance in favor of avoiding duplicative discovery, *see, e.g., Wilk*, 635 F.2d at 1299; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264–66 (9th Cir. [(1964)]), *cert. denied*, 379 U.S. 900, 85 S. Ct. 186, 13 L. Ed. 2d 175 (1964), and still others have simply left the balancing to the discretion of the trial court, *see, e.g., Stavro v. Upjohn Co. (In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.)*, 664 F.2d 114, 120 (6th Cir. 1981).

United Nuclear, 905 F.2d at 1427–28 (footnote omitted). The Tenth Circuit concluded that the Seventh Circuit’s approach in *Wilk* was the most appropriate:

“[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another’s discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.”

Id. at 1428 (alteration in original) (quoting *Wilk*, 635 F.2d at 1299 (citations omitted)); *see also Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 464 (D. Utah 1991) (noting that “[w]here . . . the case involves materials and information which are restricted from public access, such as materials produced under a protective order and lodged with the court under seal, it is necessary to weigh the rights of the private party litigants who produced such materials and the reasons and policies for such restrictions against the interests of collateral and other litigants in disclosure of such materials,” and stating that the Tenth Circuit has adopted the standard for modification set out in *Wilk*). The *United Nuclear* court explained that allowing collateral litigants to have access to protected discovery often is not problematic because “any legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by placing [i]ntervenors under the restrictions on use and disclosure contained in the original protective order.” 905 F.2d at 1428 (citations omitted). The court noted that “the district court must refrain from issuing discovery orders applicable only to collateral litigation,” that “[f]ederal civil discovery may not be used merely to subvert limitations on discovery in another proceeding . . .,” and that “a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation.” *Id.* (omission in original) (quoting *Wilk*, 635 F.2d at 1300). But the court cautioned that “[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation are, of course, for the [collateral] courts.” *Id.* (alterations in original) (quoting *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986)).

- The Tenth Circuit recently analyzed the standard for modification of a protective order in

a case in which the United States intervened to obtain modification of a protective order to allow disclosure of documents obtained under the protective order to government agencies other than the Securities and Exchange Commission (SEC) and the United States Attorney's Office. See *SEC v. Merrill Scott & Assoc. Ltd.*, 600 F.3d 1262, 1268 (10th Cir. 2010). The court noted that “[a]s a sheer matter of power[,] the court has authority to alter the terms of a protective order it has entered, and . . . ordinarily requests to modify are directed to the district court’s discretion and subject to review only for abuse of discretion.” *Id.* at 1271 (omission in original) (quoting 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2044.1, at 575–76 (2d ed. 1994); citing *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008)). The court emphasized the importance of considering the parties’ reliance on a protective order before modification, particularly in cases where the government seeks modification:

Protective orders serve the vital function of “secur[ing] the just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant.” *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979) (quotation and citation omitted). This being the case, courts should be wary of retroactive attempts to modify them in ways that undermine the justified reliance of a witness such as Dr. Gerber on a valid order circumscribing the use and availability of information disclosed through discovery. Unless protective orders are “fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.” *Id.* “[W]itnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.” *Id.* at 295–96.

These concerns overshadow the general rule that “the district court has broad discretion in judging whether [the alleged] injury [to the party opposing modification] outweighs the benefits of any possible modification of the protective order.” *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1299 (7th Cir. 1980). Typically, when considering whether to modify a protective order, courts examine any tangible prejudice to the party opposing modification that outweighs the benefits of modification. Where, as here, it is the federal government that seeks to undermine the continued integrity of the protective order, however, courts have required a greater showing than the typical standard. Given the government’s “vast investigatorial resources and power for oppression,” *United Nuclear*, 905 F.2d at 1428 n.1, courts have required a showing of “unusual

circumstances,” *Wilk*, 635 F.2d at 1300, or even “extraordinary circumstances,” *United Nuclear*, 905 F.2d at 1428 (quotation omitted), before permitting the government to benefit from access to confidential information provided pursuant to a protective order via modification of the order.

Id. at 1272–73 (alterations in original).

- In a district court case, the court entered a stipulated, blanket protective order “upon a threshold showing of good cause under FED. R. CIV. P. 26(c) that the discovery [would] involve confidential, proprietary, or trade secret information . . .,” and explained that the order’s terms were consistent with cases in its district that “place the burden of proving confidentiality on the party asserting the claim of confidentiality.” *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, No. 05-md-1721-KHV, 2009 WL 951532, at *2, *3 (D. Kan. Apr. 7, 2009). The court explained that “the burden of proving confidentiality under a blanket protective confidentiality order ‘never shifts from the party asserting that claim [of confidentiality], only the burden of raising that issue.’” *Id.* at *3 (alteration in original) (footnote omitted). The court noted that the retained power to modify protective orders acts as a “safety valve” and “assumes particular importance in the context of blanket protective orders, which are generally entered without extensive, if any, balancing of affected interests.” *Id.* (footnote omitted). The court continued: “The uncontested nature of blanket protective orders and the absence of any judicial determination of good cause with respect to specific documents arguably make such confidentiality orders particularly vulnerable to subsequent modification.” *Id.* (footnote omitted). The court noted that “[a] protective order is always subject to modification or termination for good cause.” *Id.* at *4 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004)). The court relied on another case for the proposition that “the ‘party seeking dissolution [of a longstanding protective order] bears the burden of showing that intervening circumstances have removed potential prejudice from disclosure that the protective order was initially intended to protect.’” *Id.* (alteration in original) (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Penn. 1981)). The court held that when a party to an agreed protective order seeks to modify the order, the moving party “should have the burden of persuasion” because the party “agreed to the protective order . . . and the Court [initially] found sufficient good cause to enter the parties’ joint protective order.” *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 2009 WL 951532, at *4. The court described the following standard:

In assessing requests to modify, courts balance the potential harm to the party seeking protection against the requesting party’s need for the information and the public interest served by its release. If good cause for the protective order existed when entered, only a change in circumstances by which the good cause is either removed or outweighed by other interests would justify modification. . . .

Good cause requires balancing the harm to the party seeking

the protective order and the importance of disclosure to the public. Some factors the court may consider in making this determination, include “privacy interests, whether the information is important to public health and safety and whether the party benefitting from the confidentiality of the protective order is a public official.”

Id. at *5 (footnotes omitted).

- In the context of a defendant’s request to modify a protective order to allow the defendant’s experts to publish their findings, one court concluded that the lenient standard in *United Nuclear* and *Wilk* did not apply. See *Taylor v. Solvay Pharms., Inc.*, 223 F.R.D. 544, 548–49 (D. Colo. 2004). The protective orders at issue were entered upon a finding of good cause, based on concern for the privacy and safety of the families of the victims and perpetrators of a school shooting, as well as the safety of the general public. *Id.* at 547. The court found that “[t]he standard to be used in deciding whether to modify the [protective orders] is not obvious.” *Id.* at 548. The court distinguished *United Nuclear* because the movant “had not suggested that the materials at issue . . . would assist it in another lawsuit or that continued protection of the materials would force it to engage in repetitive discovery in any other case.” *Id.* at 548–49. The court also found that *United Nuclear*, and its requirement that parties opposing modification of a protective order demonstrate prejudice to avoid modification, was inapplicable because “[m]any of the families interested in the materials [were] not parties to [the] case and no one appears to advocate on their behalf or on behalf of the public at-large.” *Id.* at 549. The court also examined the more stringent Second Circuit standard described in *TheStreet.com*, and concluded that “[t]hough that standard might have application here, where the non-party families relied upon the protective order by producing material and testifying in depositions, this case does not require such a sweeping rule.” *Id.* The court settled on the following standard: “Because good cause for the [protective orders] existed when the Magistrate Judge issued them, only a change in circumstances by which the good cause is either removed or outweighed by other interests would justify modification.” *Id.* The court determined that the First Circuit’s decision in *Public Citizen* set out an appropriate standard under the facts, where the court upheld modification because “the party seeking modification had met its burden of showing that ‘the reasons underlying the initial promulgation of the order in respect to the particular document sought no longer exist[ed]; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular documents public.’” *Id.* (alteration in original) (quoting *Pub. Citizen*, 858 F.2d at 791–92).

ELEVENTH CIRCUIT

Standard for Entering a Protective Order

- The Eleventh Circuit has recognized that there is no common-law right of access to discovery materials not filed with the court, see *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (per curiam) (holding that the news organizations’ “common-law

right of access does not extend to information collected through discovery which is not a matter of public record”), and that news organizations “possess no First Amendment rights to the protected [discovery] information which override the provisions of FED. R. CIV. P. 26(c),” *id.* The court explained that a protective order could be issued under Rule 26(c) upon a showing of good cause, and elaborated:

“Good cause” is a well established legal phrase. Although difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action. In a different context, this court has identified four factors for ascertaining the existence of good cause which include: “[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order.” *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1985). In addition, this circuit has superimposed a “balancing of interests” approach to Rule 26(c). *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

Id. at 356.

The court explained that agreed protective orders can be necessary to facilitate discovery, but that even when such orders are entered, the burden remains on the party seeking confidentiality to show good cause for protecting individual documents upon a later challenge:

Because parties often resist the exchange of confidential information, “parties regularly agree, and courts often order, that discovery information will remain private.” The *Manual for Complex Litigation, Second*, prepared by the Federal Judicial Center, suggests that in complicated cases where document-by-document review of discovery materials would be unfeasible, an “umbrella” protective order, similar to the one issued in this case, should be used to protect documents designated in good faith by the producing party as confidential. Under the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party. Protective measures requested by the parties incorporating umbrella orders have been approved by other courts pursuant to Rule 26(c).

Id. (internal citations omitted); *see also Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1362 (N.D. Ga. 2002) (“[C]alling a document confidential does not make it so in the eyes of the court; these consensual protective orders merely delay the inevitable moment when the court will be called upon to determine whether Rule 26(c)

protection is deserved, a decision ultimately rooted in whether the proponent demonstrates ‘good cause.’” (citation omitted). The *Alexander Grant* court also articulated the reasons that umbrella protective orders may be necessary:

The realities of today’s world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document. The order issued in this case, as in others, is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. After this sifting, material can be “filed” for whatever purpose consistent with the issues being litigated whether by pretrial hearing or an actual trial. Judicial review will then be limited to those materials relevant to the legal issues raised. History has confirmed the tremendous saving of time effected by such an approach. The objective is to speed up discovery. Efficiency should never be allowed to deny public access to court files or material of record unless there has been an appropriate predicate established. The procedures utilized here allow the litigation to proceed expeditiously without compromising the rights of anyone. . . . We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c).

820 F.2d at 356–57.

- The Eleventh Circuit has also set out the following standard:

Public disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe that discretion. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 2208, 81 L. Ed. 2d 17[] (1984). Where discovery materials are concerned, the constitutional right of access standard is identical to that of Rule 26(c) of the Federal Rules of Civil Procedure. *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989) (citations omitted). Accordingly, where a third party seeks access to material disclosed during discovery and covered by a protective order, the constitutional right of access, like Rule 26, requires a showing of good cause by the party seeking protection. *Id.*

Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) (per curiam).

With respect to the common-law right of access to judicial documents, the court explained that “[n]ot unlike the Rule 26 standard, the common-law right of access requires a balancing of competing interests.” *Id.* at 1311 (citation omitted). But the court cautioned that there is no common-law right of access to discovery materials:

Although there is some disagreement about where precisely the line should be drawn, when applying the common-law right of access federal courts traditionally distinguish between those items which may properly be considered public or judicial records and those that may not; the media and public presumptively have access to the former, but not to the latter. An illustrative example is the treatment of discovery material, for which there is no common-law right of access, as these materials are neither public documents nor judicial records.

Id. (footnote and citation omitted).

With respect to the balancing required under Rule 26(c), the court stated:

Rule 26(c) permits a court upon motion of a party to make a protective order requiring “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.” FED. R. CIV. P. 26(c)(7). The prerequisite is a showing of “good cause” made by the party seeking protection. *See id.* Federal courts have superimposed a balancing of interests approach for Rule 26’s good cause requirement. *Farnsworth v. Procter & Gamble, Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (citations omitted). This standard requires the district court to balance the party’s interest in obtaining access against the other party’s interest in keeping the information confidential. *Id.*

Id. at 1313.

In her concurring opinion, Judge Black pointed out that discovery is necessarily a presumptively private endeavor:

If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be

oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge.

Id. at 1316 (Black, J., concurring) (quotation marks omitted) (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986)). Judge Black explained that “the purpose of discovery is to resolve legal disputes between parties, not to provide newsworthy material.” *Id.* (Black, J., concurring). Judge Black further explained that the press could intervene to challenge a protective order as overly broad, but that the courts do not have the resources to deal with document-by-document challenges:

To facilitate prompt discovery and the timely resolution of disputes, this Court has upheld the use of umbrella protective orders similar to the one used in this case. *See, e.g., McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987). In these cases, we did not permit the media to challenge each and every document protected by the umbrella order. *See McCarthy*, 876 F.2d at 92; *Alexander Grant*, 820 F.2d at 356. Instead, the media was permitted only to challenge the umbrella order as being too broad, based on a variety of factors. *See id.* (listing four factors). We have restricted the scope of the media’s challenge because a document-by-document approach would not only burden the trial court, but, more importantly, it would interfere with the free flow of information during discovery. *See id.* at 355–56. Such interference by parties who have no interest in the underlying litigation could seriously impair an Article III court from carrying out its core function—resolving cases and controversies. *See Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1017 (11th Cir. 1992) (Edmondson, J., dissenting).

Id. at 1316–17 (Black, J., concurring) (footnotes omitted).

- A court in the Eleventh Circuit has stated:

Rule 26(c) authorizes the Court “for good cause shown” to protect parties from “undue burden or expense” in discovery by ordering “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way” FED. R. CIV. P. 26(c)(7). The party moving for a protective order has the burden of demonstrating “good cause.” *Williams v. Taser Int’l, Inc.*, No. 1:06-CV-0051, 2006 WL 1835437, at *1 (N.D. Ga. June 30, 2006) (Story, J.). In demonstrating good cause, the movant must “make a ‘particular and specific demonstration of fact as distinguished from

stereotyped and conclusory statements’ supporting the need for a protective order.” *Id.* (citations omitted); *see also United States v. Dentsply Int’l, Inc.*, 187 F.R.D. 152, 158 (D. Del. 1999) (“‘Broad allegations of harm, unsubstantiated by specific examples,’ do not support a showing for good cause.”) (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)).

Estate of Manship v. United States, 240 F.R.D. 700, 702 (N.D. Ga. 2006) (omission in original).

Standard for Entering a Sealing Order

- The *Chicago Tribune* court recognized a heightened standard under the common-law right of access analysis where a court seals an entire case:

In certain narrow circumstances, the common-law right of access demands heightened scrutiny of a court’s decision to conceal records from the public and the media. Where the trial court conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not, it must be shown that “the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to that interest.” This heightened scrutiny is necessitated by the fact that entire civil cases otherwise open to the public are erased as if they never occurred.

263 F.3d at 1311 (alteration in original) (internal citations omitted). In contrast, the court stated that “[t]he common law right of access standard as it applies to particular documents requires the court to balance the competing interests of the parties.” *Id.* at 1312. The court concluded that the degree of public access to court documents depends on the documents’ involvement in judicial decisionmaking on the merits of a case: “The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold.” *Id.* (footnote omitted).

- In connection with sealing documents filed with the court, the Eleventh Circuit has also recognized that the court has an independent duty to scrutinize requests for sealing:

[E]ven where no third party challenges a protective order, “[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record.” *Citizens First Nat’l Bank of Princeton v.*

Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (citations omitted). Otherwise, “the interest in publicity will go unprotected unless the media are interested in the case and move to unseal.” *Id.*

Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1363 (N.D. Ga. 2002) (second alteration in original).

The *Martin Luther King* court discussed the common-law right of access to judicial records:

Because the “operations of the courts and the judicial conduct of judges are matters of the utmost public concern,” courts have long recognized the public’s right to inspect and copy judicial records. Nevertheless, this common-law right of access to the courts is not absolute. For example, the public has no common-law right of access to discovery materials, exchanged during a process that is typically conducted in private with minimal judicial supervision. Further, even where litigants file discovery materials with a court in connection with pretrial discovery motions, such as motions to compel, the supporting discovery documents are not subject to the common-law right of access. However, discovery materials filed with the court “in conjunction with pretrial motions that require judicial resolution of the merits [are] subject to the common-law right” This is because, unlike privately exchanged discovery materials, “documents filed as part of a dispositive motion, such as a summary judgment motion,” assist the court in determining the parties’ substantive rights, serve as a substitute for trial, and render those discovery documents “judicial.”

Nevertheless, even where the common-law right of access attaches, only in extraordinary circumstances need the denial of such access be justified by a compelling interest. Instead, the common-law right of access merely necessitates a “good cause” analysis under Rule 26(c). This analysis requires the court to (1) determine whether valid grounds for the issuance of a protective order have been presented; and (2) balance the public’s interest in access against the litigant’s interest in confidentiality. Where the proponent of the protective order contends that the materials at issue contain trade secrets, for example, the court must first determine whether such assertion is true. To present a *prima facie* case for trade secret protection, the proponent of the protective order must prove that it consistently treated the information as a secret and took steps to guard it, the information is of substantial value to the proponent, the information would be valuable to the proponent’s competitors, and the information “derives its value by virtue of the effort of its

creation and lack of dissemination.” If the proponent fails to satisfy this first inquiry, then no “good cause” exists for the protective order. If satisfied, however, the court must then weigh the proponent’s interest in confidentiality against the public’s interest in access before ultimately deciding whether to issue the order.

Id. at 1365–66 (alteration and omission in original) (internal citations omitted).

With respect to the First Amendment right of access, the court stated that “[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access’s compelling interest standard,” and that “for purposes of determining whether to unseal such discovery materials, the First Amendment right of access standard is ‘identical to the Rule 26 good cause standard.’” *Id.* at 1366 (alteration and omission in original) (citations omitted). The court also explained that “[w]ith respect to discovery documents submitted to a court in connection with a dispositive motion, rather than ‘[m]aterials merely gathered as a result of the civil discovery process,’ the Eleventh Circuit has presented a somewhat muddled First Amendment analysis,” and stated that “[e]ven though documents filed in support of dispositive motions are used to facilitate a resolution of the action on the merits, and are likely considered by courts in lieu of a trial to adjudicate the parties’ substantive rights, the Eleventh Circuit has declared that the good cause standard, rather than the compelling interest test, satisfies any First Amendment concerns.” *Id.* (second alteration in original) (citing *Chicago Tribune*, 263 F.3d at 1316; *Citizens First Nat’l Bank*, 178 F.3d at 946).

Standard for Modifying a Protective Order

- The Eleventh Circuit has not firmly set out a specific standard for modifying a protective order. *See SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 526 (N.D. Ala. 2003). The *SRS Technologies* court noted that there is “no consensus among the circuits as to the proper standard to apply” to modification. *Id.* at 527. The court distinguished the First Circuit’s *Public Citizen* case, explaining that in the case at bar, the parties mutually agreed to the terms of the protective order and the plaintiff was not a public citizen group seeking to obtain documents for public benefit, but a party seeking to use confidential documents in lawsuits against third parties. *Id.* After surveying the approaches in different circuits, the *SRS Technologies* court settled on the following approach:

While this review of authority reveals no majority rule or consensus among the circuits, and no dispositive case in the Eleventh Circuit, one undisputed point does emerge: the trial court retains the power and the discretion to modify a prior protective order. *See, e.g., Public Citizen*, 858 F.2d at 782; *United Nuclear*, 905 F.2d at 1427. Exactly what standard should guide a trial court in deciding whether to modify a protective order is less clear. The Second Circuit test, urged by defendants, applies a stringent standard that requires the

moving party to show extraordinary circumstance or a compelling need to modify a protective order. *In re Agent Orange*, 821 F.2d at 147. As noted, the Eleventh Circuit rejected this strict standard in favor of grand jury access to material produced in civil litigation and covered by a protective order. *In re Grand Jury Proceedings*, 995 F.2d [1013,] 1020 [(11th Cir. 1993)]. The court assumes that the Eleventh Circuit would not follow that rejected standard in a case involving access to protected material for use in a future civil case, even though the circumstances of these two cases vary widely. The court concludes, however, that the Eleventh Circuit would not adopt the per se rule of disclosure employed in *In re Grand Jury Proceedings*, 995 F.2d at 1015, in situations like this case that do not involve the special concerns of a grand jury subpoena.

This court finds that the better-reasoned standard applies a balancing test to determine whether any justification exists for lifting or modifying the protective order, similar to that employed by the Third Circuit. *See Pansy*, 23 F.3d at 790. As the Third Circuit noted, one factor the court should consider is the reliance placed by the parties on the protective order. *Id.* Another important factor should be the integrity of court orders and the purpose of confidentiality orders in streamlining the discovery process. *See Miller, supra*, 105 HARV. L. REV. at 499–501.

Id. at 529–30. In considering modification, the court found it important that one of the parties sought to undo the protective order after the parties had agreed to it, that the defendant had relied on the protective order, that it was important to promote reliance interests for future cases, that the plaintiff had waited until after the lawsuit settled to seek changes, and that the parties had settled the lawsuit without either party admitting liability. *See id.* at 530.

- In the context of a nonparty seeking modification of a stipulated protective order, a court in the Eleventh Circuit has explained that the party seeking confidentiality bears the burden of showing good cause for protection. *See McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39, 42 (N.D. Fla. 1998) (“[W]here good cause was not shown for the initial issuance of the protective order, parties seeking to maintain the protective order must establish the need for continued protection (i.e. good cause).” (citation omitted)). The court stated that although “some jurisdictions have held that general concerns of case management and efficiency have been held not to establish the requisite good-cause required for the initial issuance of a protective order,” *id.* (footnote omitted), where there has been reliance on the protective order, “the good-cause analysis for maintaining the protective order differs from the good-cause analysis which would normally accompany an initial request for a protective order,” *id.* The court held that “additional factors such as reliance on the protective order, the status and needs of the person or entity seeking modification, and the pendency of other litigation

brought by the person or entity seeking modification, will factor into the court's determination of the propriety of maintaining the protective order." *Id.*

The court found reliance to be an important factor in considering modification, noting that "[f]ailure to protect Defendants' reliance on the Protective Order would not only prejudice the confidentiality interests of Defendants, it would undermine the effectiveness of protective orders in facilitating discovery." *Id.* at 43 (alteration in original) (footnote omitted) (quoting *State of Florida v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993) (internal citations omitted)). The court also focused on whether other litigation was pending against the party opposing modification, noting that "[c]ourts have reasoned that the absence of any pending litigation makes it less likely that modification will avoid repetitious or duplicative discovery, and that allowing modification may result in harassment." *Id.* (citation omitted). The court pointed out that another court had focused on the status of the nonparty as an investigator, rather than a litigant, and found that this fact required the party seeking modification to demonstrate adequate grounds for granting the request. *Id.* (citing *H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551 (S.D.N.Y. 1985)).

D.C. CIRCUIT

Standard for Entering a Protective Order

- The D.C. Circuit has recognized the need for flexibility in considering protective orders:

Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise. *See, e.g.*, Adv. Comm. Note, 28 U.S.C. App., p. 715 ("The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure"); *Burka v. HHS*, 87 F.3d 508, 517 (D.C. Cir. 1996) (factors considered include "the requester's need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material, and the harm which disclosure would cause to the party seeking to protect the information"); *Hines v. Wilkinson*, 163 F.R.D. 262, 266 (S.D. Ohio 1995) ("the Rule's incorporation of the concept of 'good cause' implies that a flexible approach to protective orders may be taken, depending upon the nature of the interests sought to be protected and the interests that a protective order would infringe"); *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551, 556 (S.D.N.Y. 1985) (assessing interests of third party state governments that had subpoenaed from plaintiff documents plaintiff had obtained from defendant in discovery subject to protective order); WRIGHT, 8 FEDERAL PRACTICE AND PROCEDURE 2D § 2036, at 484–86 ("the existence of good cause for a protective order is a factual matter to be

determined from the nature and character of the information sought . . . weighed in the balance of the factual issues involved in each action”).

United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C. Cir. 1999) (omission in original). The court noted that Rule 26 incorporates the flexibility necessary to accommodate the interests at issue in different cases: “[A]lthough ‘the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.’” *Id.* (quoting *Seattle Times*, 467 U.S. at 35 n.21). The court explained: “[T]he good cause standard of Rule 26(c) comports with the first amendment not fortuitously but precisely because it takes into account all relevant interests, including those protected by the first amendment.” *Id.* at 959–60. The court concluded that “the ‘good cause’ standard in the Rule is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case.” *Id.* at 960.

- A court in the D.C. Circuit has explained that the party seeking the protective order “must make a specific demonstration of facts to support her request for the protective order quashing the deposition.” *Alexander v. FBI*, 186 F.R.D. 71, 75 (D.D.C. 1998). The court stated:

Specifically, good cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense. The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one. Indeed, “[t]he moving party has a heavy burden of showing ‘extraordinary circumstances’ based on ‘specific facts’ that would justify such an order.” *Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles*, 179 F.R.D. 41, [48] (D. Mass. 1988). *See also Bucher v. Richardson Hospital Auth.*, 160 F.R.D. 88, 92 (N.D. Tex. 1994) (stating that protective orders prohibiting depositions are ‘rarely granted’ and then only if the movant shows a “particular and compelling need” for such an order). Moreover, the showing required under Rule 26(c) must be sufficient to overcome plaintiffs’ legitimate and important interests in trial preparation. *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (“[T]rial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary infringement.”).

Id. (first and third alteration in original).

- Another court has stated:

Note that plaintiff argues that there is a presumption under Rule 26(c) that “discovery should be open.” I see no basis for such a presumption in that Rule. See Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV[.] 331 (2006). To the contrary, in my view, determining whether there should be public access to materials disclosed in discovery requires a nuanced balancing of various factors, including “(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.”

Huthnance v. Dist. of Columbia, 255 F.R.D. 285, 288 n.3 (D.D.C. 2008) (internal record citation omitted) (quoting *Anderson v. Ramsey*, No. 04-CV-56, 2005 WL 475141, at *2 (D.D.C. Mar. 1, 2005) (citing *United States v. Hubbard*, 650 F.2d 293, 324–25 (D.C. Cir. 1980))). The court also explained:

“[G]ood cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense.” *Fonville v. District of Columbia*, 230 F.R.D. 38, 40 (D.D.C. 2005), but “[t]he party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one.” *Id.* “Accordingly, courts apply a balancing test, weighing the movant’s proffer of harm against the adversary’s ‘significant interest’ in preparing for trial.” *Doe [v. Dist. of Columbia]*, 230 F.R.D. [47,] 50 [(D.D.C. 2005)].

Id. at 296 (first and second alteration in original).

Standard for Entering a Sealing Order

- In *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), the D.C. Circuit discussed factors to be considered in sealing court documents in the context of a criminal suppression hearing. The court recognized the “important presumption in favor of public access to all facets of criminal court proceedings.” *Id.* at 317. The court recognized the following factors in considering whether the sealing of the documents at issue was appropriate: (1) the need

for public access to the documents at issue; (2) previous public use of the documents; (3) whether objections to unsealing are raised and the identity of those objecting; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice by disclosure; and (6) the purposes for which the documents were introduced to the court. *See id.* at 317–22.

With respect to the first factor, the court considered the fact that the public had access to the courtroom proceedings on the relevant motion, the memoranda filed by the parties, the trial judge’s decisions on the motion, the stipulated record, and the trial of the criminal charges. *Id.* at 317–18. The court also considered the fact that none of the documents at issue were used in the examination of witnesses, referred to in the judge’s decision, or included as part of the stipulated public record. *Id.* at 318.

With respect to the second factor, the court explained:

Previous access is a factor which may weigh in favor of subsequent access. Determining whether, when and under what conditions the public has already had access to court records in a given case cannot of course guide decision concerning whether, when and under what conditions the public should have access as an original matter. However, previous access has been considered relevant to a determination whether more liberal access should be granted to materials formerly properly accessible on a limited basis through legitimate public channels and to a determination whether further dissemination of already accessible materials can be restrained.

Id. (footnotes omitted).

With respect to the third factor, the court noted: “The kinds of property and privacy interests asserted by [a nonparty] to require retention of the documents under seal can be waived by failure to assert them in timely fashion, and the strength with which a party asserts its interests is a significant indication of the importance of those rights to that party.” *Hubbard*, 650 F.2d at 319 (footnote omitted). The court elaborated that “where a third party’s property and privacy rights are at issue[,] the need for minimizing intrusion is especially great and the public interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small.” *Id.* (footnote omitted).

With respect to the fourth factor, the court considered it important that the nonparty’s property and privacy interests would be infringed by making the documents public. *See id.* at 320.

With respect to the fifth factor, the court stated: “[T]he possibility of prejudice to the defendants by sensational disclosure is a factor which may weigh in favor of denying immediate public access. The likelihood of prejudice will in turn depend on a number of

factors, including, most importantly, the nature of the materials disclosed. Until such an examination is undertaken, the weight of this factor cannot be determined.” *Id.* at 320–21 (footnote omitted).

With respect to the sixth factor, the court considered it important that the documents at issue were not relevant to the crimes charged, were not used in the trial, and were not relied upon by the judge in issuing a decision on the motion to suppress. *Id.* at 321. The fact that the connection to the proceedings was minimal weighed against public access. *See id.*

- Another case examined the propriety of granting public access to tapes used in a criminal trial, and discussed the public’s general right of access to judicial documents, but also recognized that exceptions to public access exist:

[T]he tradition of access is not without its time-honored exceptions:

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not “used to gratify private spite or promote public scandal” through the publication of “the painful and sometimes disgusting details of a divorce case.” Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant’s competitive standing.

[*Nixon v. Warner Communications*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978)] (citations omitted). The public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.

In re Nat’l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981) (quotation marks omitted) (quoting *Hubbard*, 650 F.2d at 315–16 (footnotes omitted)). The court explained that “[b]ecause of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court.” *Id.* (footnote and citations omitted). The court

continued:

This discretion, however, is not open-ended. Rather, access may be denied only if the district court, after considering “the relevant facts and circumstances of the particular case”, and after “weighing the interests advanced by the parties in light of the public interest and the duty of the courts”, concludes that “justice so requires”. The court’s discretion must “clearly be informed by this country’s strong tradition of access to judicial proceedings”. In balancing the competing interests, the court must also give appropriate weight and consideration to the “presumption—however gauged—in favor of public access to judicial records.” Any denial or infringement of this “precious” and “fundamental” common law right remains subject to appellate review for abuse.

Id. (footnotes and citations omitted).

- In *DBI Architects, P.C. v. American Express Travel Related Services Co.*, 462 F. Supp. 2d 1 (D.D.C. 2006), the court applied the six factors from *Hubbard* in the context of determining whether to seal a settlement agreement in a civil case. The court stated:

The following six factors are to be considered when determining “whether and to what extent a party’s interest in privacy or confidentiality of its processes outweighs this strong presumption in favor of public access to judicial proceedings”[:]

[](1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

Id. at 7–8 (alterations in original) (quoting *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F. 2d 1268, 1277, 1277 n.14 (D.C. Cir. 1991)). The court noted that “[w]hile the sealing of court records barring public access may be justified when a litigant’s privacy interest outweighs the public’s right to know, the balancing of these important interests is a matter committed to the trial court’s sound discretion.”¹⁶ *Id.* at 8 (citing *Johnson*, 951 F.2d at

¹⁶ The court denied the motion to seal, noting that the settlement agreement had not been filed with the court and there

1277).

Standard for Modifying a Protective Order

- The D.C. Circuit has explained that “[g]enerally, [t]he decision to lift or modify a protective order is proper where changed circumstances eliminate ‘a continued need for protection.’” *In re Vitamins Antitrust Litig.*, No. Misc. 99-197(TFH), MDL 1285, 2001 WL 34088808, at *6 (D.D.C. Mar. 19, 2001) (second alteration in original) (citation omitted). The court also noted that “[p]rotective orders may also be modified to meet the need[s] of parties in other litigation.” *Id.* (citation omitted). The court stated:

Courts have used various formulae in determining whether to modify a protective order. In balancing competing interests, courts have weighed, *inter alia*, efficiency concerns, reliance interests upon the continued integrity of the protective order, and the public interest in open access to records and documents. A significant factor for many courts is whether the discovery sought will obviate the need for that party to engage in duplicative discovery. Implicit in this consideration is a determination of the discoverability of the materials sought.

Id. (internal citations and footnotes omitted). The court also stated that “[c]ourts have considered factors such as: whether the movant is a party to the original litigation or non-party intervenor, whether the protective order was agreed upon by the parties, whether the party seeking intervention is the government or a private party, and whether modification is sought for purely private reasons or for public reasons.” *Id.* at *6 n.16.

The court noted that courts have taken various approaches to modification of a protective order:

One line of authorities . . . place[s] the burden on the intervening party moving for modification. The rationale for this line of cases is that a party to a protective order is entitled to rely upon it. A second line of cases, however, hold[s] that the party seeking to continue a protective order bears the burden of demonstrating good cause. The rationale underscoring this line of cases is that to place the burden on the party seeking discovery of documents covered by a protective order would place an undue burden on the public’s right of access and generally ignores the fact that civil litigants have an obligation to produce all relevant information.

Id. at *6 n.18 (quotation marks omitted) (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D.

was no need for its terms to be entered in the record of the case. See *DBI Architects*, 462 F. Supp. 2d at 8.

499, 502 n.7 (S.D. Iowa 1992)).

- A court in the D.C. Circuit has explained that protective orders “may be modified to serve important efficiency or fairness goals in the court’s discretion.” *Infineon Techs. AG v. Green Power Techs. Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005) (citing *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *Alexander*, 186 F.R.D. at 100). The court noted that “[m]odification of a protective order requires a showing of good cause,” that “[g]ood cause’ implies changed circumstances or new situations,” that “a continuing objection to the terms of an order does not constitute good cause to modify or withdraw a protective order,” and that “[t]he party seeking modification of a protective order bears the burden of showing that good cause exists.” *Id.* (citations omitted); accord *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. Civ. 99-3298, 01-MS-50 (MDL)(RCL), 2004 WL 2009414, at *2 (D.D.C. May 17, 2004).

The *Infineon* court listed relevant factors, including: “(1) the nature of the protective order; (2) the foreseeability of the modification; (3) the parties’ reliance on the protective order; and (4) the presence of good cause for modification.” 247 F.R.D. at 2 (citations omitted). In addition to considering these factors, the court also considered important the fact that the party seeking confidentiality had not shown how it would be prejudiced by modification, and noted that “confidentiality concerns can be allayed by the limited modification, and by putting . . . counsel [in the related proceeding] under the terms of the Protective Order.” *Id.* (citing *In re Jenoptik AG*, 109 F.3d 721, 723 (Fed. Cir. 1997)).¹⁷

¹⁷ The court also considered the factors identified in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466 (2004), to be used in assessing a discovery request under 28 U.S.C. § 1782(a), which governs proceedings in a foreign tribunal. See *Infineon*, 247 F.R.D. at 4–5. The court recognized that the statute did not control the outcome in its case, but found that the factors were helpful in assessing the motion for modification of a protective order, which was made by a party for the purpose of providing documents to its counsel in Germany for use in proceedings there. The *Intel* factors include: “(a) whether the person from whom discovery is sought is a participant in the foreign proceeding; (b) the nature of the foreign tribunal, the character of the proceedings underway, and the receptivity of the tribunal to U.S. federal judicial assistance; (c) whether the request is an attempt to circumvent foreign proof gather restrictions; and (d) the intrusiveness or burden imposed by the discovery.” *Id.* at 4 (quoting *Intel*, 124 S. Ct. at 1483).

FEDERAL CIRCUIT¹⁸

Standard for Entering a Protective Order

- In analyzing Court of Federal Claims Rule 26(c), the counterpart to Federal Rule of Civil Procedure 26(c), the Federal Circuit explained that “[a] movant for a protective order . . . must show ‘good cause’ why a protective order should issue. Good cause requires a showing that the discovery request is considered likely to oppress an adversary or might otherwise impose an undue burden.” *Forest Prods. Northwest, Inc. v. United States*, 453 F.3d 1355, 1361 (Fed. Cir. 2006) (citing *Capital Prods., Inc. v. United States*, 49 Fed. Cl. 607, 611 (2001)).

Standard for Modifying a Protective Order

- In one case, applying First Circuit law, the Federal Circuit noted that “in determining whether a protective order should be modified, the court must balance the privacy interests of the parties against the public interest in access to the discovery information.” *Baystate Techs., Inc. v. Bowers*, 283 F. App’x 808, 810 (Fed. Cir. 2008) (unpublished) (per curiam).

¹⁸ The Federal Circuit applies the law of the regional circuit when considering procedural issues not unique to patent law. See *In re Advanced Micro Devices, Inc.*, 230 F. App’x 971, 972 (Fed. Cir. 2007) (unpublished) (“Because this case involves a procedural issue not unique to patent law, we apply the law of the regional circuit . . .” (citing *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996))); see also *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1304 (Fed. Cir. 2009) (“We apply our own law with respect to issues of substantive patent law and also with respect to certain procedural issues pertaining to patent law. We apply the law of the regional circuit on non-patent issues.” (internal citation omitted)), *cert. denied*, 130 S. Ct. 111 (2009); *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1373 (Fed. Cir. 2008) (“This court applies the law of the regional circuit to discovery issues.” (citation omitted)). Because whether to grant or modify a protective order is a procedural issue not unique to patent law, the law of the regional circuit, rather than the law of the Federal Circuit, would apply when the Federal Circuit considers requests to grant or modify a protective order. See *Advanced Micro Devices*, 230 F. App’x at 972–73 (applying Ninth Circuit law to the decision of whether to grant a motion for protective order); *Schlafly v. Caro-Kann Corp.*, No. 98-1005, 1998 WL 205766, at *3 (Fed. Cir. Apr. 28, 1998) (unpublished table decision) (considering a request to review a protective order under Ninth Circuit law because the Federal Circuit “review[s] matters not within [its] exclusive jurisdiction, such as matters relating to discovery, under the applicable law of the regional circuit in which the district court sits . . .” (citation omitted)); but see *In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373, 1377–78 (Fed. Cir. 2010) (concluding that “[a] determination of whether a trial lawyer should be denied access to information under a protective order because of his additional role in patent prosecution, or alternatively be barred from representing clients in certain matters before the U.S. Patent and Trademark Office (‘PTO’), is an issue unique to patent law,” and holding that “[g]iven the unique relationship of this issue to patent law, and the importance of establishing a uniform standard, . . . the determination of whether a protective order should include a patent prosecution bar is a matter governed by Federal Circuit law”). As a result, the Federal Circuit does not have a unique set of decisions regarding the general standard for granting or modifying protective orders. The cases discussed from the Federal Circuit are examples of the application of the law of other circuits. In *Deutsche Bank Trust*, which applied Federal Circuit law to the determination of whether a protective order should include a patent prosecution bar, the court noted the general standard that “[a] party seeking a protective order carries the burden of showing good cause for its issuance,” and concluded that “[t]he same is true for a party seeking to include in a protective order a provision effecting a patent prosecution bar.” 605 F.3d at 1378 (citing FED. R. CIV. P. 26(c); *Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc.*, 813 F.2d 1207, 1209–10 (Fed. Cir. 1987)).

- In another case, applying Ninth Circuit law, the Federal Circuit stated:

In *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 475 (9th Cir. 1992), the court stated that “Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation.” The court stated that “legitimate interests in privacy can be protected by putting the intervenors [the parties requesting modification of the protective order] under the same restrictions as those contained in the original protective order” and noted that the parties in the case had agreed to use the information only in accordance with the protective orders. *Id.*

In re Jenoptik, AG, 109 F.3d 721, 723 (Fed. Cir. 1997) (alteration in original).¹⁹

¹⁹ The dissent argued that the court also should have considered issues of comity, and argued that “[i]t is improper use of United States discovery procedures, by a party to a German action, to place in evidence, in Germany, trade secret information that is not discoverable under German law.” *In re Jenoptik*, 109 F.3d at 725 (Newman, J., dissenting).